No. 86-46

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In The

Supreme Court of the United States

October Term, 1985

CHARLES A. WEIL,

Petitioner,

vs.

JOSEPH T. McCLOUGH and ERMYN STROUD,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Does the regulation herein abridge the Privileges and Immunities Clause of the Fourteenth Amendment to communicate violations of law or complaint to a police officer?

2. Does the regulation herein deny equal protection of the laws to horn noises or motorists?

3. Was petitioner denied due process of law by conviction on charges not made?

4. May a New York municipal regulation make a civil proceeding out of one penal in nature; though *in pari materia,* held governed by the criminal law by the New York State Court of Appeals and Criminal Procedure Law; by a self-serving chicane on an accusatory instrument to deny constitutionally protected rights?

5. Does abridgement of the most practicable channel of communication to an officer, not infringe First Amendment rights?

6. Is the regulation herein not overbroad and unreasonable?

7. Do respondents' rules of disclosure and denials thereof violate the Sixth Amendment?

8. Is the cozenage herein of general importance likely to recur?

9. Did proceedings in the administrative agency herein contravene the separation of powers?

10. Was denial of supplemental pleading, one year after the complaint of many intervening proceedings, motions, material, relevant occurrences and admissions, not an abuse of discretion?

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OPINIONS BELOW

The order of the United States Court of Appeals filed May 15, 1986 denying petition for rehearing (*en banc*) appears as Appendix A, *infra*. The unreported opinion of the United States Court of Appeals for the Second Circuit dated March 13, 1986 appears as Appendix B. The memorandum decision of the United States District Court for the Southern District of New York filed

November 16, 1984 appears as Appendix C.

JURISDICTION

The decision of the Court of Appeals for the Second Circuit *en banc* was filed May 15, 1986. This petition for certiorari was filed within 60 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND REGULATION INVOLVED

The Fourteenth Amendment of the United States Constitution appears, *infra*, as Appendix M. The relevant regulation involved is New York City Traffic Regulations, Section 1430,3-4.05 which states:

> Sound Signal Devices. No person shall operate or use or cause to be operated or used any sound signal device so as to create an unnecessary noise, except that: . . . No person shall operate or use, or cause, or cause to be operated or used any klaxon installed on a motor vehicle, except as a sound signal of imminent danger.

STATEMENT OF THE CASE

The matter herein is of such importance as to affect the constitutional rights of every licensed automobile driver which number 157 million, 90% of every resident over the age of 16 and minor offenders all over the country.

Petitioner, age 88, resides about 200 feet south of 59th Street, Park Avenue, East Lane and on Sunday, June 6, 1982 was heading

towards a garage at 58th Street between Third and Lexington Avenue. There was a gridlock (spillback) at 59th Street on both the northbound and southbound lane intersection with Park Avenue [violations of both New York City Traffic Regulation ("NYCTR") 5 and Vehicle and Traffic Law ("V&T") 1175]. Petitioner wedged his way into eastbound 59th Street and thereafter wormed his way east on 59th Street. This street was lined with parked cars at both curbs (north and south) with some cars empty and double-parked, leaving less than ten feet for the flow of traffic (violating NYCTR 71 and 83).

About 25 minutes later, petitioner, in back of a bus, perceived a police officer, walking west from Lexington Avenue on the south sidewalk as if stationed east thereof. He signalled with his arm to said policeman tryin to call attention to the traffic violations west of, and behind petitioner, which signal the officer saw, failed to acknowledge and kept walking west. When the officer came within fifteen feet, petitioner beeped his klaxon, almost inaudibly (in a non-residential area with about 15 cars making noise with engines and mufflers), lest the officer vanish before petitioner could communicate and inform the officer of said violations which were taking place behind petitioner and in the area in which the officer was walking. The officer then approached petitioner and handed him a simplied information stating only the number of a regulation allegedly violated and the words "no emerg" in his handwriting.

On June 8th, petitioner wrote respondent's administrative agency for text of the regulation pursuant to New York Criminal Procedure Law ("CPL") 100.10, 100.25, 100.40 and

> . . . exactly where he [the officer] was, and what duty he performed at the following times on June 6, 1982, after 5:00 P.M. daylight saving. . . .

and thereafter made further demands for such disclosure prior to the administrative hearing, none of which demands were complied with because of the length and volume of such provisions of criminal law in agency, state and federal courts.

At the administrative hearing held June 15, 1984, despite many efforts to stay same on constitutional grounds, the officer admitted the three gridlock violations at Park Avenue, including the Lexington Avenue intersection, petitioner could not have seen behind the bus, nor did he dispute the other violations above-mentioned for supplemental pleading.

Petitioner brought an Article 78 proceeding in New York Supreme Court, *pro bono publico,* conceded such in respondents' answer, to stay the administrative hearing, until the regulation's constitutional validity was passed upon, and for failure of disclosure of facts and circumstances that New York laws relatively made mandatory to prepare for agency hearing.

New York courts evaded all constitutional questions despite repeated motions in state courts and herein below for stays of administrative hearings, all of which were denied. The hearing was held and petitioner found guilty, fined $250, which was duly paid, otherwise petitioner could not appeal. Respondents then brought a motion for summary judgment, dismissing herein below on grounds of *res judicata* and collateral estoppel which the District Court denied and granted petitioner's motion to address the constitutional validity of the regulation.

Nor, was there pleaded by respondents in the record, as in the opinion that:

1. Petitioner honked his horn "apparently a number of times";

2. That there was an alternative channel of communication "flashing lights" or "calling out" which could have been answered irrefutably: a call out, would have been futile, with petitioner's right window closed, noise of many cars' engines and mufflers and scattered horn-blowing at the Lexington Avenue gridlock which was admitted by the officer.

2(a) There were no lights to flash at 5:00 P.M. daylight savings time, one of the longest days of the year. Lack of alternate channel of communication was specifically pleaded in the complaint, May 25, 1983, and called for an affirmative defense specifying, what, if any, such channel was available. There was none in any papers of respondents and was only supplied by the court, *sua sponte,* in opinion *hors* record.

3. Furthermore, the officer admitted there had been an emergency that required 12-15 officers to clean up three gridlocks at the very time the simplified information was being served. Such abuse of discretion is compounded by the glaring distortion of the record that petitioner was only seeking to "advise the traffic officer of the massive traffic jam.", also *hors* record, rather than the "violations of law", pleaded.

Neither is there in the record anything that calling an officer's attention to a violation of law, *sua sponte,*

> "undercuts the usefulness of indicating the existence of an emergency."

Then courts below in their opinions did not address a syllable to the point relative to the rights, privileges, and *immunities,* to inform a police officer, citing *In re Quarles & Butler, infra* at Point I, a *ratio decidendi.* Nor is there a word pleaded or raised in respondents' papers that the officer "acknowledged (sic) the hand signal" for that is the reason petitioner beeped his horn

and only ascertained two years later at the hearing when the officer admitted seeing the hand signal to which he made no response.

REASONS FOR GRANTING THE WRIT

I.

THE REGULATION HEREIN INFRINGES THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT TO COMMUNICATE VIOLATIONS OF LAW TO A POLICE OFFICER.

There were undisputed violations of laws. It was admitted not only in the June 15, 1985 administrative hearing by the officer, *see also*, page 5 of brief on petition for certiorari (No. 83-1482) herein and pleaded *ab initio* in this proceeding and all state court proceedings. It insults the intelligence to suppose it was to communicate to the officer anything other than such violations.

> Among the rights and privileges which has been recognized by this court to be secured to citizens—are the rights: It is believed his right and my right to communicate to the executive officers any information which he has of the commission of an offense—and such information is a privileged—communication. . . . U.S. v. Logan, 144 U.S. 263.

Accord: In re Quarles & Butler, 158 U.S. 532 at 535; *Roviaro v. United States,* 353 U.S. 53.

Also overlooked is the relatively more serious nature of the violations the officer failed to "ticket" than an evanescent "honk" particularly gridlock (the curse of New York City traffic and pedestrians).

It is covered by NYCTR 71, 83, 88 and V&T 1175, and by Section 131.1, 2, 3 pursuant thereto, in New York City also punishable as a moving violation under V&T 1175, only ascertained after the June 15 hearing according to the New York Times, November 14, 1984 (29a) of which the Court will also take judicial notice.

Accord: Schuster v. City of New York, 286 A.D. 392, 394; *Lindsey v. New York Telephone Company,* 405 U.S. 66, 89; *Toher v. Pollak,* 44 N.Y. 2d 613; *Chapman v. Houston Welfare,* 441 U.S. 613; *United States v. New York Telephone,* 442 U.S. 176.

> Among the fundamental personal rights and liberties which are secured to all persons by the fourteenth amendment by a state. . . .
> *Thornhill v. Alabama,* 310 U.S. 88, 95; *United States v. Grace,* 461 U.S. 177, 187

> It does not have to be a violation of law, if only to make a complaint.
> *Lindsey v. Normet,* 405 U.S. 56 at 89.

II.

THE REGULATION DENIES EQUAL PROTECTION OF THE LAWS, ONLY TO MOTORISTS' OBJECTIVE, NARROW, STANDARDS, LIMITS, OR SPECIFICITY REQUIRED IN ALL OTHER BONA FIDE NOISE REGULATIONS.

A horn is not *malum in se;* nor is use of same. Under V&T 375 it is equipment required of every motor vehicle in New York State, to be used for "signalling". In *all* five other targets of bona fide noise regulations there are narrowly prescribed standards, limits, and specificity:

(a) On distances at which noise shall be audible; at least 50 (not 15) feet (1403,5-5, 17).

(b) It also only forbids operation of a klaxon when it creates a sound level, beyond the parameter (88-10dB(A), per *Saia, infra*) beyond those 50 feet (not fifteen, as herein) creating a discrimination impermissible in a regulation penal in nature.

(c) Must annoy, disturb, injure, or endanger the comfort, repose, health, peace or safety of a person, or which causes injury to plant or animal life or damage to property or business (1403.3,1.03-1.03; or 1403.3-1-1.05(zz) or;

(d) Lasts more than 10 seconds for any one emission (1403.3-4.05) or;

(e) Otherwise exceeds sound levels expressed in terms of decibels per 1403.3-5, 11, 13, 15, 21(b).

It is only against motorists' horns no narrow standards, specificity, or limit is required in violation of the Constitution.

Nor is there in respondents' answer or opinion below any answer to the challenge:

> on the basis of what reasonable criterior pertinent to noise is there an effective classification (of motorists) than all other noise regulations.

Accord: Yick Wo v. Hopkins, 118 U.S. 532; *Reed v. Reed,* 404 U.S. 71, 76; *Royster Guano v. Virginia,* 412 U.S. 412 at 414.

A. There is invidious classification against horn noises.

That there is a discrimination against automobile horns is obvious, undisputed, and respondents' burden to justify it is not carried. *Lindley v. National Carbonic,* 220 U.S. 61 at 79.

Failure of the officer to "ticket" the undisputed gridlockers, a far more serious offense, evidences the discrimination

> imposing a special burden on a selected class. *Tarrance v. Florida,* 188 U.S. 519-20.

Berger, *Government by Judiciary, 178, accord Colgate v. Harvey,* 296 U.S. 404 at 412; *Edward v. California,* 314 U.S. 179, *modifying on other grounds.*

> not only are defendants unable to demonstrate a compelling state interest—they fail even to establish a reasonable basis.
> *San Antonio v. Rodriguez,* 411 U.S. 1, 17.

> The police power may not be employed to prevent evils of a remote—character—when the restraint imposed upon the exercise of private rights is

> disproportionate to the amount of evil that will be corrected.
> Willoughby, Constitution of the United States, Nos. 1-18.

Accord: People v. Bunis, 9 N.Y. 2d 1.

> Where fundamental personal liberties are involved, they may not be abridged by the states simply on a showing that the regulatory statute has some rationale *relationship to the effectuation of a proper state purpose "When there is a significant encroachment upon personal liberty the state may prevail only upon showing a subordinating interest which is compelling. (Bates v. Little Rock 361 U.S. 615, 524.) The law must be shown "necessary and not merely rationally related to the accomplishment of a permissible state policy.
> *Griswold v. Connecticut,* 381 U.S. 474, 497.

* marginal per Grad and Rodgers, *infra.*

The purpose to avoid (per District Court opinion)

> to seriously under cuts the usefulness of such horns as a method of indicating the existence of an actual emergency condition.

is not only not compelling and remote, but also beyond the competence of the legislature, *a fortiori,* a municipal council, *People v. Bunis,* 9 N.Y. 2d 1 at 3.

B. Classifications that are Limited

Classifications are suspect and closely scrutinized when

infringing on rights constitutionally protected are involved, as herein

> The strict scrutiny test is invoked where a challenged law can be said to create a classification drawn along suspect lines which impairs some fundamental constitutional right.
> *Montgomery v. Daniels,* 38 N.Y. 2d 41, 91. *Accord* 82 Harvard Law Review 1128; *New Orleans v. Dukes,* 427 U.S. 297; *People v. Acme Markets,* 38 N.Y. 2d 326, 330; *U.S. Dept. of Agr. v. Moreno,* 413 528, 533; *United States v. Guest,* 383 U.S. 745, 762; *Berger, supra,* 422-4; *Oregon v. Mitchell,* 400 U.S. 112, 163; *Crosby v. Workers' Comp.,* 57 N.Y. 2d 305, 312; *Flyler v. Doe,* 457 U.S. 200, 210; *Roe v. Wade,* 410 U.S. 113, 115; *Steiffely v. Thompson,* 394 U.S. 618, 635; *People v. Acme Markets,* 38 N.Y. 2d 326, 330.

in which the court emphasized the word "*compelling*" and cited ten cases in point.

C. Classifications conflicting with protected rights must be narrowly drawn and carefully tailored.

Such matters as evanescent noise (*cf.,* Grad) involving communication, are not of such compelling character, admitted by other specialists in environmental law

> Where certain "suspect classifications or "fundamental interests are involved, the Supreme Court's review of the justification for the difference in treatment has been much more stringent with the result that in certain areas—classifications are almost presumptively invalid.

Rodgers Federal Environmental Law, p. 122.

III.

GLARING DENIAL OF DUE PROCESS

Petitioner invites attention to statement in district court opinion, not only *hors* record, nor charged in accusatory instrument (50a), nor any pleading by respondents, the officer's handwriting

horn honking

not plural, just *one* honk.

Yet that opinion found petitioner had honked his horn

> "apparently a number of times" *plural*. (App. 18a).

Petitioner was also found guilty of blowing his horn (App. 18a).

> "Which annoyed and disturbed his fellow motorist"

covered by Regulation 1403-11.03 not 1403-4.05(1) on the accusatory instrument overlooking

> Conviction upon a charge not made would be sheer denial of due process.
> *de Jonge v. Oregon*, 299 U.S. 353, 362; *Stromberg v. California*, 283 U.S. 359, 367-8; *Zant v. Stebbins*, 456 U.S. 410; *Dunn v. United States*, 442 U.S. 400, 406; *In re Primus*, 436 U.S. 412, 428.

A fortiori after denial of discovery (Point VII, *infra*).

The three Fourteenth Amendment clauses, uncontrovertedly violated, *supra,* because they "run afoul" of the First Amendment, have absolutely nothing to do, connection with, or dependence on the First Amendment infringement (*infra*). Those three clauses suffice to invalidate the regulation, apart from any First Amendment infringement or chill, and in addition thereto overlooked in last sentence of Circuit Court opinion herein.

IV.

THE OPINION'S REPUGNANT, NOVEL PROPOSITION CONSTITUTIONAL RIGHTS ARE EXTINGUISHABLE BY A SELF SERVING DECLARATION ON AN ADMINISTRATIVE AGENCY ACCUSATORY INSTRUMENT MAKING A CIVIL PROCEEDING OUT OF A MATTER CRIMINAL ACCORDING NEW YORK STATE COURT OF APPEALS.

There are 157 million licensed drivers in the United States, 9,709,000 in New York State, affected by the instant rulings, (90% of all residents over 16 years of age)

> (World Almanac from Federal Highway Administration and National Transportation Safety Boards at p. 149)

that denied all constitutional protection by a body of municipal civil servants and a single policeman's *ad hoc* predilection that because said body of civil servants, responsible to no one, politically or judicially, based only on their self-serving declaration their proceedings are civil, when under all rulings in New York State, Court of Appeals, governing such matters, same is

"penal in nature"

and governed in New York State by the

"criminal law"

The opinions completely misapprehend what is completely *hors record* (and completely refuted by supplemental pleadings #9, 10, 19, and he had to be completely blind not to have been aware of, the "condition" but that its *causes* were the violations. Petitioner deemed it his right and duty to exercise his constitutional rights per privilege and immunity clause to inform him of *violations of law* while there were undisputed violations of the Fourteenth Amendment's clauses

equal protection
due process, and
Privileges and immunities
denied facts and circumstances.

On the desperately repugnant proposition, never raised by respondents, inconsistent with the memorandum decision dated November 16, 1984 (App. 13a) citing no authority, significantly never raised prior to their March 11, 1985 memorandum, and then only to evade the strict scrutiny test per petitioner's Point II

the relatively light civil penalty

courts below were misled relative the "civil" penalties by respondents' glaring missatements in their March 11, 1986 memorandum

the regulation imposes only civil penalties
enactment with civil rather than criminal penalties.

There is no such imposition or enactment in Sec. 1403.3-4.05(1). It is only on the *sui generis* accusatory instrument.

important constitutional questions

of vital importance to millions of motorists mulcted in this, as was petitioner, and would be in the future.

Nor is this matter civil, on the face of the sham summons with "recidivism", and terms like "charge", "plea", "offense", "violations", "revocation of license", plus *People v. West,* 13 N.Y. 2 180 at 182 and *People v. Byron,* significantly an automobile noise offense, holding such matters penal in nature, governed by criminal law in New York State, undisputed by appellee's answer brief

> The prosecution in this case was for "traffic infraction", not a crime, but such a prosecution is penal in nature and the rules of criminal law are generally applicable (*People v. Lewis,* 13 N.Y. 2d 180).

Accord: People v. Byron, 17 N.Y. 2d 62 at 66; *Thompson v. City of Louisville,* 362 U.S. 199 at 203-4.

The only statutory provision for use of a simplified information in New York Criminal Procedure Law nor may it provide for "civil penalties only" CPL 100.10, 100.25 for "criminal action" in a "criminal court".

Furthermore, District Court significantly, repeatedly, in opinion and memorandum decision November 16, 1984, misapprehended the accusatory instrument as a "citation". There is no such thing in New York CPLR nor for "Notice of Violation", as herein by a self serving declaration thereon.

Decidendi on this aspect: Implementing the so called "civil" penalties is New York City Administrative Code 1403.3-8.19

providing for "punishment" by imprisonment for failure to pay such "civil penalties", up to 60 days, in lieu of procedures for enforcement of civil judgments; Art 51 CPLR or Small Claims Court. Uniform City Court Act Sec 4, 1812.

Can a municipal body run riot also with the procedural partition in New York litigation, mandated by the state legislature? Into a world of its own unprovided for by legislation or constitution? Thus was district court's opinion (21a) misled by appellee's chicane; misnomer of their proceedings as civil, to evade rules; civil, criminal and constitutional.

What a despicable revenue seeking device for all agencies to circumambulate all civil rights—really run riot! Other states do likewise, e.g., Florida.

This is apart from the *glaring inconsistency* between the ruling November 16, 1984, finding there were constitutional issues herein, despite awareness (App. 8a) of the $250 fine on one hand and on the other, the finding October 8, 1985 (App. 22a) such issues were barred by the relatively light civil penalty.

Circuit Court took note of another repugnancy in the accusatory instrument: Fine $50 for first offense; $250 for not "paying the two dollars", on good faith constitutional grounds!

The civil/criminal transposition applies not only to 157 million drivers but all other minor offenders according to the instant accusatory instrument : air code offenses, water code offenses, consumer affairs, food vendors, approaching the Soviet model.

V.

ABRIDGEMENT OF ONLY ONE CHANNEL OR MODE OF COMMUNICATION, VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS AND WOULD BE OVERBROAD.

Petitioner pleaded "no other channel of communication" (Complaint ¶ 7 p. 45a).

Apart from having to be assumed true, it violates constitutional rights if the regulation abridges only one channel or mode, *a fortiori* to report violations of law.

There is no law, regulation, or even practice therefor. Regulations of the Commissioner of Motor Vehicles, part 52 "Traffic Hazard Warning Devices" per V&T 215, 375, sub div 18A, Blashfield, *supra* 202.29, 106, 114.

However, assuming there were such law or practice, first suggested by district opinion, absent respondents pleading, petitioner's right window was open

> calling out
> flashing lights

at 5:00 P.M. one of the longest daylights of the year and the ambient noise of fifteen cars at the Lexington Avenue gridlock, their engines and mufflers going; and after the officer failed to respond to the undisputed arm signal and seemed to be walking away out of sight, it overlooks

> When confronted with an emergency, motorist is not required to use the best judgment or adopt the safest course when there is only time for

> instinctive action. *Oberman v. Rent-a-Car,* 56 A.D. 2d 814 at 815; Blashfield Automobile Law, 102, 29.

when in real life it is the signal most instinctively used. Respondents cavalierly assumed petitioner had

> ample means by which to communicate with a police officer.

Respondents had to meet that challenge or go down to defeat on the authority they cited, *Consolidated Edison v. P.S.C., supra,* for the regulation leaves no adequate

> alternative channels for communication.

and *Linmark Ass. v. Township of Willingboro,* 431 U.S. 85, which respondents cited supports this at p. 93.

> Serious questions exist as to whether the ordinance leaves open ample alternative channels for communication—The alternatives are far from satisfactory—This ordinance violates the First Amendment.

Respondents quote of *Grayned, supra,* discreetly overlooked its further language:

> a vague law impermissibly delegates policy matters to policement, judges, and juries on an *ad hoc* and subjective basis with the attendant dangers of arbitrary and discriminatory application. (Emphasis supplied at 108.)

as herein, where a policeman discriminated between ticketing gridlocks, which may well require his appearance in court, because

of the two points, likely to be defended; while he gets his quota, or goal, without court appearance under this regulation, because people are less likely to plead not guilty, for a fine alone re: police quotas c.f. New York Times, June 25, 1982, per Sec. 131.

The officer never denied petitioner's hand signal to him prior to the beep, admitting "he sees me", corroborating petitioner relative to the sequence of events:

1. Petitioner sees the officer; signals to him;

2. Because the officer ignores the signal, sounds the klaxon. For how could the officer tell petitioner saw him unless it was because of the hand signal?

Violations of NYCTR 71, 83, 88 and V&T 1175 were dangers *ipso facto* more than imminent but "*clear and present*", that could have much more serious long-lasting consequences than an evanescent horn-sounding; loss of life, fire, crime. Conduct and express activity are likewise protected as are alternate modes of expression.

A fortiori to policemen of violations of law:

> *Linmark Associates v. Township of Willingboro* at 93, Serious questions exist as to whether the ordinance leaves open ample alternative channels for communication—the alternatives then are far from satisfacatory—this ordinance violates the first amendment at 97.

VI.

THE REGULATION IS OVERBROAD AND UNREASONABLE.

Horn banning is not only overbroad, but complicated and confusing by the circumductive exception with all the vices for which courts have struck down statutes and *a fortiori* overzealous, overreaching administrative regulations that have proliferated, as in *Saia v. New York,* 334 U.S. 558 at 562.

> There are standards prescribed for the excercise of discretion. The statute is not *narrowly drawn* to regulate the volume of sound (the decibels) to which they must be adjusted. Noise can be regulated by regulating decibels. Any abuses can be controlled by *narrowly drawn* statutes, *Saia* at 559-60. (Emphasis supplied.)

It is a matter of common knowledge, of everyday occurrence. It can also achieve a reasonable objectivity by specifying volumes and distances.

1. The visceral split second "beep" when the driver in front is blocking traffic, "goes to sleep" when the light turns green;

2. A driver parks, leaving less than 10 feet for traffic flow (NYCTR 83);

3. Blocks an intersection by spillback (gridlock);

4. When someone exits illegally on the traffic side (as distinguished from the curb side), especially when on the other side the traffic lanes there are less than 10 feet for movement of traffic;

5. There are many three lanes, one way arteries, like Franklin Roosevelt Drive, Grand Central Parkway, within city limits on which there are accidents or stalled cars in the middle lane, with occupants exiting and milling around;

6. When traffic lights don't work;

7. Inadvertent sounding of horn on sharp turn of the wheel, many of which have klaxon sounders on the wheel rim;

8. If about to pick up a person on a sidewalk and he is window shopping ten feet away.

Such reasonable objective is as in Byron, *infra*. The evil sought to be prevented is "excessive or unusual noise".

> The purpose of the statute is not to prohibit noise, but to minimize noise. Byron, 17 N.Y. 2d 62 at 67-68.
>
> Any abuses which loud speakers (or horns) can be controlled by narrowly drawn statutes. (*Saia* at 562)

Nor is this regulation solely one of vagueness that

> Men of intelligence must necessarily guess at its meaning. *Conally v. General Construction Co.*, 269 U.S. 385 at 391, 343.

but also "differ at its application" violating the first essential of due process of law, and make the decision to blow or not to blow in a split second *a fortiori* where there is an "overbroad" definition in a penal low or regulation. *Grayned v. City of Rockford*, 408 U.S. 104 at 114; *Board of Education v. City of*

Buffalo, 57 M. 2d 472. It must be in "just relation to the protection of the public", *Adams v. Tanner,* 244 U.S. 590 at 596, or give "a rough idea of fairness", *Colten v. Kentucky,* 407 U.S. 104 at 110; *Matter of Sloan,* 81 A.D. 2d 1014. An additional vice of this regulation is its peculiar susceptibility to arbitrary enforcement.

> The proper balance between public need and the necessary safe-guarding of constitutional rights, *People v. Katz,* 21 N.Y. 2d 132, 134.

Accord: *People v. Dominick* 168 M. 2d 425.

For the exception "imminent danger" makes the banning overbroad criticized by Judge Manfield in Jewish Concerned Youth v. McGuire, 421 F. 2d 471 at 478.

> The Supreme Court has recently been invalidating state statutes very similar to the legislation before us on the ground that they "suffer from impermissible 'overbreadth' " and had a "stifling effect."

If, at the expense of First Amendment freedoms, a statute reaches more broadly than is reasonably necessary to protect legitimate state interests, a court may forbid its enforcement.

> It is unreasonable and beyond the power of legitimate exercise of the police power for the legislature to interdict all sales permissible and illicit alike, in order to prevent those which are illicit—may not make it a crime to do something which is innocent in itself merely because it is sometimes done improperly. *Peo v. Bunis,* 9 N.Y. 2d 1, at 3.

> The court must "weigh heavily the fact that communication is involved" and require that the regulation "be narrowly tailored to further the State's legitimate interest." *Id.* at 115-17, 92 S. Ct. at 2303-04. "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *N.A.A.C.P. v. Button,* 371 U.S. 415

Such banning the inoxious with the noxious violates the First, Sixth, Ninth and Tenth Amendments to the Constitution. Accord: *N.Y. v. Ferber,* 458 U.S. 747 at 769; Accord: *Peo. v. Taub,* 37 N.Y. 2d 530 at 537.

> Relative noise regulations they are almost completely ineffective—the type of acts prohibited are often isolated—escape notice unless a police officer happens to be near, by mere chance—has very low priority—is short term and evanescent. Grad "Environmental Law" 5-3

> May conceivably be applied unconstitutionally to others not before the Court., *U.S. v. Raines*

> The scope of the First Amendment overbreadth doctrine—must be carefully tied to the circumstances in which facial invalidation—is truly warranted. *New York v. Ferber* p. 769

> The existence of such a statute which readily lends itself to harsh and discriminate enforcement by local prosecuting officer at 69. *Thornhill v. Alabama,* 310 U.S. 58 at 69, also cited by respondents.

VII.

RESPONDENTS' DISCLOSURE RULES AND DENIALS VIOLATE THE SIXTH AMENDMENT.

A. For a New York penal regulation it was vague and indefinite.

Because of disclosure denial (App. 27a) June 8, 1982 petitioner was surprised by the officer's inherently incredible inconsistent perjury, believed by respondents flunky, the hearing officer, petitioner was surprised at the June 15, 1984 hearing for the regulation had "no meaning *long* recognized in law and life", *People v. Sefanik*, 103 M. 2d 539, *People v. Cruz*, 48 N.Y. 2d 410. McKinney Statutes 3b, 271c, e, f, 273.

By denying bills of particulars, compelling resort to retaining expensive counsel (contrary to CPLR 104) for written interrogatories only, more than the $50 usual fine involved, violates the Sixth Amendment raised below, denying discovery to prepare for trial and against police prejury. Admitted respondent's answer ¶12.

In an instance involving a New York simplified information as herein it was held,

> The Constitution does require that the defendant be informed of the nature of the charge and the circumstances under which he is alleged to have violated the law. *People v. Boback*, 23 N.Y. 2d 189 at 197.

The New York State CPL 100.25 McKinney commentary states:

> The form prescribed by the commissioners permits

> a minimum amount of factual information and therefore a defendant arraigned upon a simplified information is entitled as a matter of right to the supporting deposition of the complainant police officer.

Such *sui generis* deficiency, particularly in matters penal in nature, where the right to disclosure is a matter of defendants-appellees' *absolute* discretion makes it unconstitutional facially, and as applied and respondents admittedly exercised it many times herein.

VIII.

THE ISSUE IS ONE OF GENERAL ENDURING IMPORTANCE, LIKELY TO RECUR AND RESPONDENTS BURDEN TO DISPROVE.

East Meadow Ass'n v. Board of Education, 18 N.Y. 2d 139 at 135.

> However, it is settled that judicial reluctance to decide questions which need not be reached must give way when a case raises 'important constitutional issues' and the 'controversy is of a character which is likely to recur' the present is—*Matter of Gold v. Lomezo,* 29 N.Y 2d 468 at 475-76, *Accord: Matter of Bell v. Waterfront Comm.,* 20 N.Y. 2d 54 at 61;

> The question of mootness is itself a question of constitutional law (*Cf. Linery v. Jafco, Inc.,* 375 U.S. 301, 304 *et seq., Davis v. Wechsler,* 263 U.S. 22, 24; *Matter of Rosenbluth v. Finkelstein,* 300 N.Y. 402 at 404.

Associated with overbreadth is the likelihood of recurrence, wherefore:

> plaintiff sought disclosure repeatedly. How many violations of the regulation herein involved have been charged in the years 1979, 1980, 1982 and 1983.

overlooking it was appellees' burden to show unlikelihood of recurrence of the wrong herein.

> Statutory language of such a standardless sweep allows policement—to pursue their personal predilections—against entrusting lawmaking to the moment-to-moment judgment of the policeman—

Accord: Smith v. Groguen, 415 U.S. 575

IX.

RESPONDENTS BURDEN OF PROOF.

It has been held, respondents had

> the "heavy" burden of showing that there was no likelihood of recurrence (*U.S. v. W.T. Grant*, 345 U.S. 629 at 633)

Accord: U.S. v. Phosphate Export, 393 U.S. 199 at 203; *Bell v. Wolfish*, 441 U.S. 520 at 543; *Blye v. Globe Wernicke*, 33 N.Y. 2d 15 at 19.

> The burden is on the defendant to "demonstrate" that there is no reasonable expectation that the

wrong will be repeated. (*citing U.S. v. Grant, supra.)*

Such burden respondents did not carry but evaded by repeated refusals to disclose, and there is a public interest in having the legality of this regulation settled, affecting as it does, perhaps millions of drivers, many in interstate commerce. *Accord: East Meadow Ass'n v. Board of Education,* 18 N.Y. 2d 135 at 139; *Matter of Gold v. Lomenzo,* 29 N.Y 2d 468 at 476; *Dobrowsky v. Pfister,* 380 U.S. 479, 486-7; *Matter of Bell v. Waterfront Comm.,* 20 N.Y. 2d 54 at 61.

Respondents would now be estopped to deny what they prevented petitioner from proving if he had had the burden.

X.

THE ERRONEOUS DENIAL OF SUPPLEMENTAL PLEADING.

The April 19, 1985 supplemental pleading was justified because of facts, circumstances, and admissions of respondents only witness, in and after hearing by respondents' flunky, a full year after the complaint herein, particularly paragraphs 9, 10, 16, 17, 18, 19, 20, 21a, 23, 32, 38 and 41, unobjected to by appellees (*Dells v. Mundt,* 400 F. S. 1293).

It is particularly unjust because of denial of efforts to stay the hearing prior to disclosure, and contrary to *INS v. Chadha,* 459 U.S. 1027, 1097 when unconstitutionality is pleaded.

It was wrongfully delayed six months though returnable May 13. Had it been denied earlier, it could have been appealed from separately or given petitioner option to institute new action. There has been change of position.

The grounds set forth are without merit: mootness. That doctrine requires an actual controversy be extant at all stages of review (Harvard L.R. 82-376), with nothing abstract in a continuing dispute (H. L.R. 379/800).

When there is a good cause of action, as found by District Court, November 11, 1984

> a supplemental bill setting up facts subsequently occurring—is proper, *Texarkana v. Arkansas Gas,* 306 U.S. 188 at 203.

Accord: Mathew v. Diaz, 426 U.S. 67 at 75; *Southern Pacific Co. v. Conway,* 115 F. 2d 746 at 750; *New Amsterdam Casualty Co. v. Waller,* 323 F. 2d 20 at 28-9; *Altman v. General Electric,* 32 F.R.D. 255 at 6; *U.S. v. IBM,* 66 F.R.D. 223 at 29.

When justice is required, *Jorman v. Davis,* 371 U.S. 178 at 182.

It might well be viewed with other glaring anti-noise errors of the district court: requiring exhaustion of administrative remedies where constitutionality is questioned; holding the matter civil when clearly criminal; ignoring the graver offense: gridlock, plus distortion of the record; relative "traffic jam" rather than "violations of law" pleaded in *haecverbis.*

CONCLUSION

For above reasons a writ of certiorari should be issued instead of remand (petitioner's age 88) to review the judgment and opinions of the courts below.

Respectfully submitted

CHARLES A. WEIL
Petitioner, Pro Se

APPENDIX A—DECISION ON PETITION FOR REHEARING, EN BANC FILED MAY 15, 1986

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the day of May one thousand nine hundred and eighty-six.

CHARLES A. WEIL,

Plaintiff-Appellant,

v.

JOSEPH T. MC CLOUGH and ERMYN STROUD,

Defendants-Appellees.

Docket No. 85-7848

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by plaintiff-appellant, Charles A. Weil, pro se,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that

no such judge has requested that a vote be taken thereon.

s/ Elaine B. Goldsmith
Elaine B. Goldsmith
Clerk

APPENDIX B—ORDER OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED MARCH 13, 1986

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 13th day of March, one thousand nine hundred and eighty-six.

PRESENT:

Hon. James L. Oakes,
Hon. Amalya L. Kearse
Hon. George C. Pratt
Circuit Judges.

Charles A. Weil,

Appellant,

v.

Joseph T. McClough and Ermyn Stroud,

Appellees.

Charles A. Weil appeals pro se from a judgment of the United States District Court for the Southern District of New York, Gerard L. Goettel, Judge, dismissing pursuant to Fed. R. Civ. P. 12(b)(6) his constitutional challenge to New York City's anti-horn-honking code provision. We affirm.

On June 6, 1982, at approximately 5:15 p.m., a police officer

gave Weil a Notice of Violation and Hearing for a violation of 7 N.Y. City Admin. Code ch. 9, art. 4, § 1403.3-4.05(1) (1975) ("Code"). The officer issued the violation when Weil, apparently trapped in a gridlock and wishing to inform the policeman about traffic conditions, sought to obtain the officer's attention by honking his car horn. The Code prohibits honking a horn "except as a sound signal of imminent danger."

Weil subsequently filed this action in federal district court, seeking a declaration that §1403.3-4.05(1) is unconstitutional and an order enjoining the state administrative proceedings against him. The district court denied his request for a preliminary injunction and a temporary restraining order to stay the administrative hearing. The state administrative proceedings led to the imposition of a $250 fine, which Weil has paid.* Judge Goettel thereafter reviewed Weil's constitutional claims, found them to be without merit, denied his motion for judgment on the pleadings, and dismissed his complaint.

On appeal, Weil once again raises the claim that the code provision is unconstitutional and he asks that his fine be remitted. None of his constitutional arguments withstand scrutiny.

Weil contends that his Sixth Amendment rights have been violated. The fine imposed, however, was a civil, rather than a criminal, sanction, *see United States v. $2,500 in United States Currency*, 689 F.2d 10, 12-14 (2d Cir. 1982), *cert. denied*, 465 U.S. 1099 (1984); 7 N.Y. City Admin. Code ch. 9, art. 4, § 1403.3-8.01, and the Sixth Amendment is thus inapplicable.

---

* We note without comment that the relevant regulatory provision, 7 N.Y. City Admin. Code ch. 9, art. 4, § 1403.3-8.01(b)(5), indicates that the maximum penalty for a first offense is $50 and that a fine of $250 can be legitimately imposed only for a third or subsequent offense.

Appendix B

Weil also argues that the regulation violates the First Amendment because it is both vague and overbroad. It is not, however, impermissibly vague: The ordinance forbids the use of car horns "except as a sound signal of imminent danger." This is not an ambiguous prohibition. The boundaries separating permissible and impermissible behavior are set forth with adequate specificity and clarity. *See Grayned v. City of Rockford,* 408 U.S. 104, 108-14 (1972). Nor is the ordinance impermissibly overbroad. It is, rather, a reasonable and content neutral "time, place and manner" regulation serving to advance the significant governmental interests in minimizing noise pollution and in preserving the usefulness of horn honking as a method of warning of an emergency. *See id.* at 114-21. Moreover, as a valid time, place and manner regulation, the ordinance did not infringe on Weil's constitutional rights when applied to him. *See Consolidated Edison v. Public Service Commission,* 447 U.S. 530, 535-36 (1980).

Weil also contends that the regulation violates the Fourteenth Amendment's equal protection, due process, and privileges and immunities clauses. His underlying argument here, however, is that the regulation violates those clauses because it runs afoul of the First Amendment's guarantee of the right to freedom of expression. Since there is no First Amendment violation here, these other constitutional claims must fail.

Affirmed.

A TRUE COPY
ELAINE B. GOLDSMITH

s/ Elaine B. Goldsmith
Clerk

Appendix B

s/ James L. Oakes

s/ Amalya L. Kearse

s/ George C. Pratt

Circuit Judges

N.B. Since this statement does not constitute a formal opinion of this Court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

APPENDIX C—MEMORANDUM DECISION OF UNITED STATES DISTRICT COURT FILED NOVEMBER 16, 1984

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

84 Civ. 3730 (GLG)
(Pro Se)

CHARLES A. WEIL,

Plaintiff,

-against-

JOSEPH T. McCLOUGH and ERMYN STROUD,

Defendants.

The plaintiff brought this action *pro se* seeking a declaration that N.Y. City Admin. Code § 1403.4-4.05(1) (1975)[1] is unconstitutional and an order enjoining proceedings before the New York City Environmental Control Board. The defendants now move to dismiss the action pursuant to Fed. R. Civ. P. 12(b) or, in the alternative, for summary judgment pursuant to Fed. R. Civ. P. 56(c), on the ground that the doctrine of *res judicata* bars the litigation. The plaintiff cross-moves for an order compelling certain discovery pursuant to Fed. R. Civ. P. 30 and for a stay of the Court's consideration of the defendants' motion until completion of the requested discovery. For the reasons stated below, both motions are denied.

Background

On June 6, 1982, the plaintiff received a citation for "horn honking" in violation of N.Y. City Admin. Code & 1403.3-4.05(1)

(1975). A hearing on the citation was scheduled before the New York City Environmental Control Board (the "Board"). Prior to the hearing, the plaintiff commenced an Article 78 proceeding in New York State Supreme Court, Special Term, seeking a declaration that § 1403.3-4.05(1) was unconstitutional, a stay of the hearing before the Board, and an order prohibiting the Board from proceeding further with the matter. By order dated December 17, 1982, Special Term denied the requested relief. The plaintiff appealed to the Appellate Division, First Department, which affirmed the order of the Special Term. The New York Court of Appeals dismissed the plaintiff's appeal "on the ground that no substantial constitutional question [was] directly involved;" it later denied the plaintiff's motion to vacate its order of dismissal. The plaintiff then applied for a writ of certiorari, which the United States Supreme Court denied on April 23, 1984.

On May 29, 1984, the plaintiff brought the instant action seeking declaratory and injunctive relief similar to that sought in his state court action. The plaintiff also moved for a temporary restraining order enjoining the Board from proceeding with his administrative hearing. On June 1, 1984, this Court denied the plaintiff's motion for a temporary restraining order.

The hearing on the citation was held on June 15, 1984, before an administrative law judge. The judge found the plaintiff guilty of illegal horn-honking and fined him $250. The plaintiff is appealing this decision through the proper channels.

Discussion

A. The Motion to Dismiss

The defendants move to dismiss this action, or, in the

alternative, for summary judgment, on the ground that the doctrine of *res judicata* precludes plaintiff from litigating his claims. In deciding this motion, the Court has considered matters outside the pleadings. We therefore treat this as a motion for summary judgment.

The Federal Full Faith and Credit Statute, 28 U.S.C. § 1738 (1982), requires that "[a] federal court . . . give to a state court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City School District Board of Education,* 104 S. Ct. 892, 896 (1984). Thus, the New York doctrine of *res judicata* controls this case. That doctrine, sometimes termed "claim preclusion," forecloses the parties in any successive litigation involving the same cause of action from raising any issues or defenses that were, or might have been, litigated in the first suit. *Winters v. Lavine,* 574 F.2d 46, 56 (2d Cir. 1978); *Matter of Reilly v. Reid,* 45 N.Y.2d 24, 27, 379 N.E.2d 172, 407 N.Y.S.2d 645 (1978).

Although the New York courts have struggled with the question of when lawsuits involve the same cause of action, *id.* here, there is no such difficulty. In both the Article 78 proceeding and the instant action, the plaintiff sought identical relief. He also raised the same constitutional claims which arise out of the same set of facts. We therefore conclude that the two litigations involve the same cause of action.

Consequently, this case turns on whether the plaintiff's constitutional claims were or might have been litigated in the prior proceeding. The defendants argue that the plaintiff's constitutional claims were litigated and decided against the plaintiff in the New York state courts, or, alternatively, that the plaintiff forewent

an opportunity to raise his constitutional claims. We disagree with the defendants. At every stage in the prior state court proceedings, the plaintiff proferred his constitutional claims. However, each state court denied him an opportunity to litigate and refused to decide these claims.

The only written opinion issued by a state court in this matter, the decision of Special Term, reads as follows:

> Upon the foregoing papers this petitioner's motion for an order prohibiting the Environmental Control Board from proceeding with the pending hearing pursuant to the Adminitrative (sic) Code 1403.3-4.05(1) of the City of New York is DENIED in all respects.
>
> Petitioner is attempting to restrain an officer from acting in a quasi-judicial capacity. This extraordinary remedy is used only when there is a clear legal right; and only when that body or officer acts or threatens to act in a matter beyond his jurisdiction.
>
> Here the Board has the legal authority to hold a hearing and render a determination on the alleged violation. Petitioner's claim that the hearing should not be held because he was denied discovery is without merit at this time. The hearing could possibly exonerate him, and render all other issues raised, moot.

Defendants' Notice of Motion, Bradley Affidavit, Exhibit 2.

Appendix C

The Special Term's opinion concerns the plaintiff's attempt to persuade the Special Term judge to take the extraordinary step of enjoining the Board. The court avoided consideration of the plaintiff's constitutional claims by noting that they might have been mooted if the plaintiff were adjudged not guilty. The defendants' representations throughout the course of this litigation confirm our understanding. For example, in opposition to the plaintiff's petition for a writ of certiorari, the defendants argued,

> "The [plaintiff's] petition [before the Special Term] was dismissed . . . because there was no need for the court to address the constitutional issues at that time; factual questions remained — and still remain — outstanding. It is after a hearing that, assuming petitioner is adjudicated to have violated the regulation, constitutional issues may properly be raised."

Brief of Respondents in Opposition to Petition for a Writ of Certiorari at 19. The defendants also presented similar arguments to this Court in opposition to the plaintiff's motion for a temporary restraining order.

Winters v. Lavine, 574 F.2d 46 (2d Cir. 1978), does not persuade us to alter our conclusion. In *Winters*, a civil rights case brought pursuant to 42 U.S.C. § 1983 (1982), the defendants sought to assert prior state court proceedings as a bar to the subsequent federal litigation. There, the plaintiff brought an Article 78 proceeding before the Appellate Division, First Department after exhausting administrative remedies. In a short opinion that did not discuss the plaintiff's constitutional claims the court ruled in the defendants' favor. The New York Court of Appeals then dismissed the plaintiff's appeal "upon the ground that no

substantial constitutional question [was] directly involved." *Id.* at 61. Despite this language, the Second Circuit found that the Appellate Division's opinion, although silent on the constitutional issues raised therein, necessarily considered and rejected the plaintiff's constitutional claims. *Id.* at 60. The Second Circuit then concluded that that decision precluded the plaintiff from litigating his constitutional claims. The situation herein is entirely different. There was no administrative proceeding prior to the plaintiff's Article 78 proceeding. Thus, the Supreme Court, Special Term, neither necessarily nor voluntarily, considered the plaintiff's constitutional claims. In fact, the court purposefully avoided those claims.

In addition, the defendants' contentions find no support in the Appellate Division's affirmance or in the Court of Appeals' order that the appeal be dismissed. In the absence of any evidence to the contrary, we believe these affirmances were grounded in the non-constitutional bases relied on by Special Term.

Thus, we cannot now find that the defendants have met their burden of establishing that the issues before us were adjudicated in a prior proceeding. *Bronxville Palmer, Ltd. v. New York,* 18 N.Y.2d 560, 563, 223 N.E.2d 887, 277 N.Y.S. 2d 402 (1966) (litigant who claims benefit of former judgment has burden of proving that the issue which he urges is precluded was involved in the prior litigation).

No state court has yet ruled on the plaintiff's constitutional claims. Nor has the plaintiff had an opportunity to raise such claims. *Res judicata* is an important doctrine that encourages reliance on judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes. *Brown v. Felsen,* 442 U.S. 127, 131 (1979); *Gramatan Home v. Lopez,* 46 N.Y.2d 481, 386

N.E.2d 1328, 414 N.Y.S.2d 308 (1979). "These strong policy bases, however, if applied too rigidly, could work considerable injustice. In properly seeking to deny a litigant two 'days in court,' [we] must be careful not to deprive him of one." *Matter of Reilly v. Reid, supra,* 45 N.Y.2d at 28. The plaintiff was denied the opportunity to litigate his constitutional claims in the prior state action. He must now be afforded his day in court.

B. The Discovery Motion

The plaintiff moves for an order compelling certain discovery pursuant to Fed. R. Civ. P. 30. With respect to this motion, the court instructs the plaintiff to consult with his adversary in accordance with Rule 3 of the Civil Rules for the Southern and Eastern Districts of New York.[2]

Conclusion

The plaintiff's motion to compel discovery is denied without prejudice, and his requst to stay consideration of the defendants' motion is denied. The defendants' motion summary judgment is denied.

SO ORDERED.

Dated: New York, N.Y.
November 16, 1984

s/ Gerard L. Goettel

GERARD L. GOETTEL
U.S.D.J.

Appendix C

FOOTNOTES

1. Section 1403.3-4.05(1) provides that:

> No person shall operate or use or cause to be operated or used any sound signal device so as to create an unnecessary noise, except that:
>
> (1) No person shall operate or use or cause to be operated or used any claxon installed on a motor vehicle, except as a sound signal of imminent danger provided that such operation or use shall be considered in any proceeding before the board pursuant to any applicable section of article VIII of this code except section 9.25 *prima facie* evidence of a violation of this subsection and that a notice of violation shall in every instance issue against a person operating, using or causing to be operated or used a claxon installed on a motor vehicle.

N.Y. City Admin. Code § 1403.3-4.05(1) (1975).

2. Plaintiff also requested that we stay the consideration of the defendants' motion pending completion of the requested discovery. Since we decide the defendants' motion in the plaintiff's favor without the aid of any discoverable materials, the requested stay is unnecessary, and we decline to grant it.

APPENDIX D—DECISION OF ENVIRONMENTAL CONTROL BOARD DATED DECEMBER 14, 1984

The City of New York
Environmental Control Board
333 W. 34th St., 7th Fl.
New York, N.Y. 10001
Telephone: 971-3600

Dated Mailed: December 14, 1984

Violation No.: 016-813-042

City of New York V.: Charles Weil

APPEAL DECISION AND ORDER

TO: Charles Weil
485 Park Avenue
New York, NY 10022

Premises: 59 St. & Lexington Avenue, Manhattan
Agency: B.A.R.
Appeal No.: 6933 Appellant: Respondent

1. An appeal to the Board was filed on June 22, 1984 from the following recommended Decision and Order rendered on the above violation by ALJ #309.

Decision Mailed	Code Section	Disposition	Civil Penalty
7-10-84	1403.3-4.05(1)	Violation	$250.00

2. After consideration of the entire record before it, the Board now renders the following Findings of Fact and Conclusions of Law:

Appendix D

At the time of the observation of the violation by the police officer there was a gridlock situation at an intersection in which respondent's motor vehicle was located.

Respondent incessantly honked the horn of his motor vehicle which annoyed and disturbed his fellow motorists.

The gridlock situation did not constitute "imminent danger" so as to constitute a defense.

The findings of fact and conclusions of law of the Administrative Law Judge are affirmed.

THEREFORE, Appellant's exceptions are ( ) Granted: ( ) Granted in part; (X) Denied; and Respondent is found (X) In violation of Administrative Code § 1403.3-4.05(1).

3. THE BOARD ORDERS THAT THE RECOMMENDED DECISION AND ORDER BE:

X AFFIRMED.

IMPOSED PENALTY OF $250.00 WAS PAID

BOARD DECISION DATE: November 28, 1984

s/ Joseph T. McClough, Jr.
CHAIRMAN
ENVIRONMENTAL
CONTROL BOARD

APPENDIX E—OPINION OF THE UNITED STATES DISTRICT COURT FILED OCTOBER 8, 1985

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

84 Civ. 3730 (GLG)

(Pro se)

CHARLES A. WEIL,

Plaintiff,

-against-

JOSEPT T. McCLOUGH and ERMYN STROUD,

Defendants.

OPINION

APPEARANCES:

CHARLES A. WEIL
Plaintiff *pro se*
485 Park Avenue
New York, New York 10007

FREDERICK A. O. SCHWARZ, JR.
Attorney for Defendants
Corporation Counsel of the City of New York
100 Church Street - Room 6C42
New York, New York 10007

Appendix E

By: Ruby E. Bradley, Esq.
Assistant Corporation Counsel

GOETTEL, D.J.

On June 6, 1982, the plaintiff, who was operating an automobile in the midst of what he described as a massive Manhattan gridlock, honked his horn, apparently a number of times. He received a citation for "horn honking" in violation of N.Y. City Admin. Code § 1403.3-4.05(1) (1975), which provides, in pertinent part, "No person shall operate or use or cause to be operated or used any claxon installed on a motor vehicle, except as a sound signal of imminent danger. . . . " *Id.* A hearing on the citation was scheduled before the New York City Environmental Control Board (the "Board"). Prior to the hearing, the plaintiff commenced an Article 78 proceeding in New York State Supreme Court, Special Term, seeking a declaration that § 1403.3-4.05(1) was unconstitutional, a stay of the hearing before the Board, and an order prohibiting the Board from proceeding further with the matter. By order dated December 17, 1982, Special Term denied the requested relief. The plaintiff unsuccessfully appealed that decision.

On May 29, 1984, the plaintiff brought this action *pro se* seeking a declaration that N.Y. City Admin. Code § 1403.4-4.05(1) (1975) is unconstitutional and an order enjoining the proceedings before the New York Environmental Control Board. On June 1, 1984, this Court denied the plaintiff's motion for a temporary restraining order. The plaintiff's administrative hearing was conducted on June 15, 1984. The administrative law judge found him guilty of illegal horn-honking and fined him $250.00.

By decision dated November 16, 1984, this Court denied the

defendants' motion for summary judgment on the grounds of *res judicata*. The defendants now move to dismiss the action pursuant to Fed. R. Civ. P. 12(b) for failure to state a claim on which relief can be granted. The plaintiff cross-moves pursuant to Fed. R. Civ. P. 12(c) for judgment on the pleadings. The plaintiff has also moved pursuant to Fed. R. Civ. P. 15(d) for leave to file a supplemental pleading and pursuant to Fed. R. Civ. P. 12(f) to strike all of the defendants' affirmative defenses. For the reasons stated below, the defendants' motion is granted. The plaintiff's cross-motion is denied. The plaintiff's other motions are thereby rendered moot.

I. *Discussion*

A. The Free Expression Claim

The plaintiff first contends that this application of section 1403.3-4.05(1) of the New York City Administrative Code ("the ordinance") violated his first amendment right to freedom of speech as incorporated in the due process clause of the fourteenth amendment. According to the plaintiff, its application limited his ability to express his desire to communicate with a specific policeman. (For purposes of this motion we will accept his claim that he was seeking to advise the traffic officer of the massive traffic jam—in case it had not come to the officer's attention—and that he was not simply expressing his frustration at being impeded by it.)

Of course, simply because conduct has a communicative element does not make a statute prohibiting or limiting that conduct *per se* unconstitutional. *Cox v. Louisiana*, 379 U.S. 536, 555 (1965). The Supreme Court has recognized the validity of enactments that reasonably limit the time, place, or manner of

speech without regard to content; that serve a significant governmental interest; and that leave ample alternative channels for communication. *Consolidated Edison Co. v. Public Service Commission,* 447 U.S. 530, 535-36 (1980).

The ordinance does not attempt to regulate the "content" of horn-honking. Rather, it prohibits all horn-honking, except in cases of imminent danger, regardless of the user's intended meaning.[1] The ordinance also leaves open alternative means of attracting the attention of a police officer. It remains for a motorist to flash his lights, signal with his hands, or call out. The plaintiff, nevertheless, asserts that his message was stifled because he had no alternate means to relay his message. However, in the same breath, he admits that his message was not, in fact, stifled; a police officer who acknowledged his hand signal proceeded to ignore it.[2] Thus, the ordinance neither discriminates among messages nor limits the expression of any particular message. It is based on the manner of expression, not on its content.

The ordinance is also reasonably related to two significant governmental interests, reducing noise and maximizing the utility of car horns. The reduction of noise, particularly in a noise polluted city like New York, is a particularly compelling government interest. *Kovacs v. Cooper,* 336 U.S. 77, 87 (1949). In this Court's view, any effort to dim the seemingly unending crescendo of honking horns on New York's city streets is to be commended. This appears to be the Supreme Court's view as well. In *Kovacs v. Cooper, supra,* the Court upheld the constitutionality of an ordinance banning sound trucks from the public streets of Trenton, New Jersey. The Court thought it permissible "to bar sound trucks with broadcasts of public interest, amplified to a loud and racous volume, from the public ways of municipalities." *Id.* at 87. To forbid, on first amendment grounds, the regulation

of horn honking, which has little if anything to do with the public interest, would be to ignore and, indeed, flaunt, this important precedent.

The honking of car horns in situations not involving imminent danger not only causes unnecessary noise, but also seriously undercuts the usefulness of such horns as a method of indicating the existence of an actual emergency condition. New York City has a compelling interest in seeing that this does not occur. Limitations on horn honking are a rational means to this end.

The Court, therefore, concludes that the ordinance is a reasonable time, place, or manner restriction that does not violate the first amendment right to freedom of speech as incorporated in the due process clause of the fourteenth amendment.

B. The Vagueness and Overbreadth Claims

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."' *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972). Of course, language can never provide meaning with mathematical certainty. The test in determining whether or not a statute is unconstitutionally vague is whether "men of common intelligence must necessarily guess at its meaning." *Broadrick v. Oklahoma,* 413 U.S. 601, 607 (1973).

> The degree of vaugeness that the Constitution tolerates . . . depends in part on the nature of the enactment.
>
> Thus, economic regulation is subject to a less strict vagueness test . . . The Court has also

> expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are less severe . . .
>
> Finally, perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights.

Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498 (1982). Although the plaintiff claims that the ordinance inhibited his speech, the ordinance poses little threat to free speech. *See supra* pp. 2-4. The relatively light civil penalty to which the plaintiff was subjected further justifies the application of only moderate scrutiny to this regulation.

A statute's certainty is measured with respect to the actual conduct of the person attacking the statute. *deLeo v. Greenfield*, 541 F.2d 949, 953 (2d Cir. 1976). The plaintiff asserts that the term "imminent danger"—the ordinance forbids all honking except that which signals "imminent danger"—did not clearly indicate to him the conduct that the ordinance proscribes, or, more precisely, that which it did not proscribe. We disagree. The plaintiff readily admits that he honked his horn not to signal danger but to attract attention. Upon reading the statute, a person of ordinary intelligence could not help but discern that the ordinance prohibits such conduct.

Even, viewed in the abstract, the phrase "imminent danger" poses little if any interpretative problem to the individual of ordinary intelligence. The word "danger" provides adequate notice in innumerable situations in our everyday lives. Likewise, the courts have consistently upheld the use of the word "imminent" against

vagueness challenges. *See, e.g., Gregory v. Chicago,* 394 U.S. 111, 116-17, 121-22 (1969) (Black, J., concurring). In *Kovacs v. Cooper, supra,* a vagueness challenge concerning the words "loud and raucous," merited "only a passing inference." *Id.* at 79. In summarily rejecting the challenge, Justice Reed stated, "While these are abstract words, they have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden." *Id.* Here, where the statute is, in our view, far more definite, the plaintiff cannot be heard to object on vagueness grounds. Even under the most exacting scrutiny, this ordinance is sufficiently definite to avoid constitutional infirmity.

The plaintiff also mounts an "overbreadth" attack against the ordinance. This effort also fails. "A clear and precise enactment may nevertheless be 'overboard' if in its reach it prohibits constitutionally protected conduct." *Grayned v. City of Rockford, supra,* 408 U.S. at 114 (footnote omitted). A finding that a regulation of speech is a valid time, place, or manner regulation precludes an overbreadth attack.[4] *Grayned v. City of Rockford, supra,* 408 U.S. at 114-121 (time place and manner analysis cures overbreadth objection). the rationale is apparent. A law that is a reasonable time, place, and manner regulation does not reach constitutionally protected conduct and, therefore, cannot be overbroad.[5]

II. *Conclusion*

The defendants' motion to dismiss for failure to state a claim for relief is granted. The plaintiff's motion for judgment on the pleadings is denied. The Court need not consider the plaintiff's motion to strike or his motion to supplement the pleadings.

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The clerk will enter judgment accordingly.

SO ORDERED.

Dated: New York, N.Y.
October 1, 1985

s/ Gerard L. Goettel

GERARD L. GOETTEL
U.S.D.J.

Appendix E

FOOTNOTES

1. Indeed, whether a honk or honks can ever relay an intelligible message (without the assistance of Morse or some other code) is debatable.

2. We need not consider the propriety of the officer's response. That issue is not before us.

3. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person or ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policement, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to " 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."

Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972) (footnotes omitted).

Appendix E

4. The plaintiff's objection to the defendants' refusal to turn over its records of all other violations of the ordinance over the last several years is immaterial. The vagueness analysis concerns only the plaintiff. *See supra* p. 5. It is also irrelevant to the overbreadth issue, since that issue can be disposed of, in this case, without discovery. *See supra* pp. 7.

5. The plaintiff's papers also appear to contend that the ordinance at issue denies him both the equal protection of the laws and due process of law in violation of the fourteenth amendment. Neither of these challenges need long detain us. The failure of the plaintiff's first amendment challenges dooms his due process and equal protection claims.

> Whenever a state law impermissibly burdens the exercise of [freedom of speech] there is actually a violation of the due process guarantee. Since the provisions are made applicable to the states by the due process clause, state laws which burden these rights constitute a denial of liberty as protected by that clause. Because the interpretation of the substantive guarantees of the first amendment are the same regardless of whether the provisions are being applied to state or federal actions, there is little need to discuss substantive due process guarantees in these cases. This same analysis applies in equal protection cases.

J. Nowak, R. Rotunda, J.N. Young, Constitutional Law 817 (2d Ed. 1983).

The other contentions in the plaintiff's papers have been considered and rejected as without merit.

APPENDIX F—DEMAND FOR DISCLOSURE DATED JUNE 8, 1982

CHARLES A. WEIL
485 Park Avenue
New York, N.Y. 10022
Tel. 752-1982

8 June, 1982

Environmental Control Board
333 West 34 Street
New York, N.Y. 10001

Citation No. E 016 813 042

Gentlemen:

Annexed please find photocopy of citation as to which I am unable to plead or defend without information requested in letter to Rules & Regulations of the City of New York, per photocopy of letter thereto, hereto annexed and made part hereof.

Meantime, I plan leaving for Europe July 1 and don't know, for sure, when I shall be back in town till after September 13 for which reason I request:

1. Continuance for a reasonable time after that date, that I may prepare a defense, and

2. Service of a verified bill of particulars and/or supporting affidavit of the complainant (illegible), exactly where he was, and what duty he was performing at the following times on June 6, 1982 after 5.00 PM Daylight saving:

5.00, 501, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15.

pursuant CPL 100.25, 100.40

Appendix F

I only have a copy of NYCTR (1974) of which #151 reads

> Horns for danger only
> A driver shall sound the horn of his vehicle only when necessary to warn a person or animal of danger.

Respectfully submitted,

s/ Charles A. Weil
Charles A. Weil

the trial is likely to take about four weeks.

Richard Wright, a Traffic Control agent, keeping intersection clear yesterday at Broadway and 34th Street.

Midtown 'Gridlock Busters' Hand Out $45 Tickets

By SUZANNE DALEY

In a rite as traditional as the holidays that invoke it, New York City yesterday began its seasonal attempt to prevent Manhattan from turning into a parking lot.

Across midtown, 30 "gridlock busters" were handing out $45 tickets to motorists caught in intersections when traffic lights changed — just one of the steps in the campaign this year.

Along with the strings of lights and the nighttime shopping, the Christmas trees and the fancy store windows, the period from Thanksgiving to New Year brings 100,000 more vehicles into Manhattan each day.

'It's Not a Crisis Yet'

"It's critical that we take these measures," Samuel J. Schwartz, the city's Traffic Commissioner, said. "It's not a crisis yet, but it will be if we don't do anything."

The latest traffic program, which began yesterday and ends Jan. 2, is more extensive than past holiday efforts.

In addition to the 30 agents assigned to keep intersections clear and the 260 traffic agents usually stationed in midtown, the city will have an extra 130 traffic agents and 100 police officers out patrolling the streets and directing traffic.

Last year there were no police officers involved in the holiday traffic effort and only about 100 extra traffic agents.

The effort this year will also concentrate on enforcing traffic rules for charter buses, which are often seen illegally parked with engines idling near such tourist attractions as Rockefeller Center and the Empire State Building. Last year, this was not a priority.

As in the past, the Department of Transportation will restrict construction in the midtown area for the next six weeks. On an average day there are about 130 projects effecting traffic. During the holiday season there will be about 30, Mr. Schwartz said.

"Only emergency work or a project that has already removed a roadway, like the Park Avenue viaduct, will be allowed to continue," Mr. Schwartz said. "And we're making sure that the emergency work is going on around the clock. If they say it's an emergency they better be at it 24 hours a day."

Extra attention will also be paid to parking regulations, officials said. Some new regulations will be in effect, including no standing rules on 49th and 50th streets between Fifth Avenue and Rockefeller Center from Dec. 18 to 27.

Gridlock Alert Days

The department will also publicize what it calls Gridlock Alert days — days when traffic is expected to be especially heavy.

On those days — the first one is next Friday — motorists who can use public transportation should do so, according to Mr. Schwartz.

The hope, Mr. Schwartz said, is to keep crosstown traffic during the holiday season moving at better than four miles per hour, an average person's walking speed. On most days it averages about six m.p.h.

"We aren't going to get traffic speeding," he said. "But we are going to keep it moving."

Since the beginning of the year, the city's traffic agents have issued about 2,300 tickets to people caught in the middle of an intersection when traffic lights change.

The 30 special agents at intersections, Mr. Schwartz said, are expected to issue at least that many tickets in the next six weeks.

Although being caught in an intersection has been a violation for more than 10 years, the city did not have a group of people specifically assigned to enforcing that regulation until now, Mr. Schwartz said.

In addition to receiving fines, drivers caught in intersections will also receive two points on their licenses.

When a driver accumulates 11 points, the Motor Vehicicle Department can revoke or suspend his license, according to George Fillieau, a spokesman for the agency.

At 45th Street and Fifth Avenue yesterday, it was not hard to find offenders despite prominent signs announcing the penalties for those who did not make it across the intersection.

They often looked bewildered when police officers tapped on their windows signaling them to pull over.

First they got an explanation of what gridlock is. Then came the part about license and registration, please.

On the other side of the intersection, Mr. Schwartz tried to reward drivers who did a good job of trying to prevent gridlock, by passing out buttons and bumper stickers. He had a hard time finding anyone.

Finally, Joe Schweke, a Brooklyn resident making a delivery in the area, pulled his van up to the intersection but even with a green light did not cross.

"Thank you very much for being a good driver," Mr. Schwartz said, handing him a button through the window. "We're trying to prevent gridlock and we want to thank you for helping. here's a button.

Mr. Schweke smiled. "I saw the sign," he said.

CBS Film at Libel Trial

he was interviewed for

APPENDIX H—NOTICE OF MOTION FOR SUPPLEMENTAL PLEADING FILED APRIL 19, 1985

84 CIV 3730 (G.L.G.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHARLES A. WEIL

Plaintiff

-against-

JOSEPH T. McCLOUGH AND ERMYN STROUD

Defendants

PLEASE TAKE NOTE: upon annexed affidavits of Charles A. Weil plaintiff will move this Court on for permission to file a supplemental pleading setting forth occurrences or events which have happened since the date of the pleading sought to be supplemented and making material and relevant prior thereto on May 13, 1985 Room 414 Federal Courthouse, Foley Square, New York, N.Y. at 10.)) A.M.

s/ Charles A. Weil
CHARLES A. WEIL
Plaintiff
485 Park Avenue
New York, N.Y. 10007
Tel 212-752-1982

APPENDIX I—PLAINTIFF'S AFFIDAVIT FILED APRIL 19, 1985

84 CIV 3730 (G.L.G.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHARLES A. WEIL

Plaintiff

-against-

JOSEPH T. McCLOUGH and ERMYN STROUD

Defendants

CHARLES A. WEIL BEING DULY SWORN DEPOSES AND SAYS:

1. I am plaintiff herein fully acquainted with all particulars and proceedings herein.

2. The complaint herein was served May 25, 1984.

3. Since that time there have been many occurrences and events herein which have happened, various motions, administrative hearings material and relevant to events and matters prior to the date of said pleading.

Wherefore plaintiff submits it would not only be in the interest of justice to grant permission to serve a supplemental pleading herein, but be a denial of justice to deny same.

s/ Charles A. Weil

sworn to before me this
19th day of April 1975

GEORGE P. FLYNN
Notary Public, State of New York
No. 30-1258330
Qualified in Nassau County
Certificate filed in New York County
Commission Expires March 30, 1987

APPENDIX J—REPLY AFFIDAVIT SWORN TO APRIL 19, 1985

84 CIV 3730
(G.L.G.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHARLES A. WEIL

Plaintiff pro se

-against-

JOSEPH T. McCOUGH and ERMYN STROUD

Defendants

CHARLES A WEIL being duly sworn deposes and says:

1. I am plaintiff *pro se* herein and fully acquainted with all facts and proceedings herein.

2. The instant matter was initiated by order to show cause because of a notice of administrative hearing for September 20, 1982, scheduled by defendants herein August 29, 1982, in Supreme Court Part II New York, as an emergency proceeding.

3. Said order to show cause (to which was annexed the petition herein, was also dated August 29, 1982 and sought in one paragraph

> *enjoining, staying* and prohibiting the respondents (defendants herein)—from proceeding further—

Appendix J

> (Note emphasis is in because of the errors and sharp practice herein, in the state court system).

Further in the application for said order to show cause

> Further ordered that—respondents—are hereby—*enjoined, stayed*, and prohibited further proceeding—and I further ask that said order—contain a *stay of the hearing set* for September 20 pending decision.

4. When the order signed by Judge Sullivan came down in Part II, striking out the entire first paragraph per Par. 3 above, plaintiff asked the clerk for leave to confer with Judge Sullivan to suggest that only the word "prohibited" be stricken, but was refused despite CPLR 104, 2001, 2002.

5. Thereafter, all affirmations in Special Term Part I by defendants were addressed *only* relative "prohibition" as if the petition had sought *only* a *writ* of prohibition, misleading all New York Courts.

6. Thereafter, plaintiff brought another proceeding before Judge Wilke in Part I, dated November 16, 1982, seeking ONLY a STAY, denied by Judge Shorter, along with petition seeking such stay; because of Judge Shorters delay per CPLR 2219.

7. Throughout herein all New York Courts were misled by such sharp practice, as if only a *WRIT* of prohibition had been sought despite such writs being available when the constitutionality of a regulation or statute is alleged, as herein in the petition annexed to the order to show cause on constitutional grounds.

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8. Such stay of Administrative hearing was also sought of the Appellate Division on April 18, 1983 and denied.

9. There was gridlock on both Park and Lexington Avenues and 59th Street, undisputedly testified to by Mrs. Weil at 4:50 P.M., and admitted by the policeman at 5:10.

10. Gridlock is covered by NYCTR, *Sec. 71-83-88* and *V&T 1175* and by Sec. 131.1,2,3, of which the Court will take judicial notice; (a much graver offense than hornblowing) punishable by loss of two points pursuant Par. (d) of Sec. 510 of Vehicle & Traffic Law, Sec. 1,2,3, and pursuant thereto, in New York City is likewise punishable as a moving violation, as under V&T, only ascertained after the June 15, 1984 hearing, according to the New York Times, November 14, 1984 (p.B-3) of which the court will also take judicial notice.

11. Such gridlock lasted 25 minutes until the simplified information was served at 5:15.

12. Plaintiff was, at the time of said simplified information, 5:15 P.M., alone in his car.

13. Said two Park Avenue gridlocks were observed from 485 Park Avenue, 150/200 feet south of 59th Street.

14. There were spaces with signs reserved for two buses on the southeast corner of Lexington and 59th Street.

15. There are trees on the north sidewalk of Park to Lexington Avenues, plus a newsstand at the northwest corner of 59th Street and Lexington, precluding seeing a gridlock on Lexington Avenue from Park Avenue as the officer testified seeing (or hearing and identifying).

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16. Throughout herein the term "imminent danger" has been equated, and held synonomous with, the term "emergency"

17. "no emerg", per Ex. D, is the term on the simplified information, not "imminent danger"

18. Defendants' "facts" (p.2) of their memorandum treated it as synonomous with "imminent danger", a non-emergency situation.

19. The officer testified—there was such emergency:

> "it would have to take four to five officers to clear at each (2) intersections surrounding. It wasn't a one-officer job. It would have been a combined effort to clean it up."

20. Also overlooked relative the violations, to which plaintiff sought to attract the officer's attention, prohibiting besides gridlocks, double-double parking, preventing ten feet for clear movement of traffic, are far more serious and consequential than sounding a horn.

21. The fact traffic regulations prohibit those acts is because they are injurious, hence dangerous. And, if those injuries or dangers are not merely "imminent" but *actual, existing, present,* while another law denies the right or means to call the police to deal with them, those actual dangers, the greater offenses, such regulation lacks all reasonableness apart from, and in addition to, any first amendment chill on communication.

21 (a) June 16, 1982 immediately following plaintiff's return to domicile, after service of the citation, he telephoned the Police

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Department to complain relative the police officer for said summons, confirmed by Ex. A herein annexed, being copy of the confirmation, the pertinent parts of which are:

> (the description of the officer) "beard" "Comp beeped horn to get P.O.' attention—issued horn no emergency"

Long before plaintiff's research he became aware of any of the other noise regulations, enumerated Point IV memorandum, dated May 25, 1984 (pp 14/15).

21. (b) Plaintiff never heard from the Civilian Complaint Board thereafter, despite letter dated April 29, 1983, a copy of which is annexed as Ex. B, a complete coverup.

21. (c) At the June 15, 1984 administrative hearing, the police officer was clean shaven and the hearing officer interrupted plaintiff's testimony to ask plaintiff, significantly, whether he identified the police officer as the one who served the citation.

22. Defendants admit efforts prior to the article 78 proceeding, to obtain disclosure were denied, of all facts and circumstances, which could lead to further disclosure favorable to plaintiff could, and have, prevented surprise at the June 15, 1985 administrative hearing, the officer was off duty when he issued the simplified information and even did not remember at what street he had been stationed prior to dismissal.

23. Nor is there a word addressed to denial of disclosure, subsequent to the Article 78 proceeding. Such disclosure was sought subsequently, repeatedly, even in this Court and stays repeatedly sought of any administrative proceeding prior to same,

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prior to appeal in the Appellate Division, even as to the number of violations of the regulation herein processed by defendants and amount of revenue collected by it, per EX C, May 23, 1984, they were protecting, as to which they had the burden of proof.

24. Never was a party so arbitrarily denied disclosure before the hearing on the merits, whether civil under CPLR, Art. 3104, or when penal in nature under Amendment 4,5 or 6.

25. The simplified information (hereinafter referred to as the citation) carries no information of the facts and circumstances.

26. It only refers to the number of a regulation plaintiff never heard of before, and the words "no emerg" written by the policeman thereon.

26. (a) Plaintiff could not find the regulation at the Bar Association Law Library, and wrote defendants who referred him to the Municipal Library.

27. It was finally obtained and plaintiff asked defendant whether there had been any ruling of any court passing on the construction or constitutionality of the regulation, and never received reply.

28. Plaintiff also asked defendant for disclosure of the officer's duty assignments, June 6, 1982, and was never replied to.

29. Plaintiff then sought discovery in petition to Special Term, Part II, August 30, 1982, it was denied.

30. In his petition to Special Term, Part I, plaintiff sought the same disclosure which was denied a few days before the first hearing scheduled for September 20, 1982, "pre-hearing conference" "at this time"

Appendix J

31. On April 18, 1983, motion to the Appellate Division, plaintiff again sought stay of further administrative hearing on the merits and was denied same without disclosure.

32. Prior to the administrative hearing on the merits, June 15, 1984, prior to which plaintiff wrote, May 23, 1984, demanding disclosure of the officers's assignments, the facts and circumstances of the citation, and number of citations produced under the instant regulation which was never replied to, Ex C hereto annexed.

33. Wherefore, plaintiff was surprised on June 15, 1984 hearing the officer testified he had been off duty when he issued the citation without the opportunity to seek further disclosure from the precinct commander, showing whether the officer had been stationed east of Lexington Avenue, since plaintiff first perceived the officer heading west and supposed, therefore, to be unaware of violations west of Lexington Avenue on 59th Street.

34. Plaintiff believed he was performing a public service in signalling the officer relative violations he had observed at Park Avenue (gridlock) and eastward on 59th Street, never doubting the legality of doing so, *a fortiori* when his undisputedly hand signal was ignored.

35. Subsequent to the citation, plaintiff queried at least a dozen patrolmen all of whom carried blank citation forms as herein, and informed plaintiff they had been served on many other so-called respondents for the same infraction as herein, wherefore plaintiff believes many such citations for horn honking have been issued, a matter of wide public interest and likely to recur.

36. Defendant's affidavit, Par. 4, overlooks plaintiff sought discovery prior to the hearing scheduled for September 20, 1982, per said affidavit, Par. 3.

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37. Plaintiff, Par.6, overlooks that prior to the Appellate Division's affirmance the United States Supreme Court ruled in INS v. Chadha, Special Term's speculation of exoneration on administrative hearing was impermissible where a statute's constitutionality validity was questioned.

38. It also overlooks that defendants misled all state courts in raising a purely procedural question, as if plaintiff had sought a *writ* of prohibition, a glaring misstatement.

39. It also overlooks plaintiff sought stays (Par.10) on grounds plaintiff had been denied disclosure.

40. That affidavit also overlooks (Par.17) greater specificity is required by the law of the State of New York than under the Federal Administrative Procedural Act.

41. The officer never denied plaintiff's hand signal TR.P.24, plaintiff testified to before sounding his horn. Plaintiff could never have seen the officer if the latter had approached from behind as the officer testified p.28, though he had previously, inconsistently admitted plaintiff saw him and he saw plaintiff (TR.pp 4,5,6).

42. When queried at the administrative hearing (TR.p.8.32) the police officer significantly forgot where he had been stationed, (TR.p.32) plaintiff reeated his demand for assignments and number of citations issued by defendants in years prior and subsequent the instant citation, and produced copies which the hearing officer took-failed to mark in evidence and return to plaintiff in violation of New York Penal Law, Article 195, so as to permit the effrontery of finding "no questions were ever posed"

Appendix J

43. Finally, plaintiff has challanged defendants to state:

a. What other means of communication did plaintiff have after signalling undisputedly to the officer.

b. On the basis of what reasonable criterion pertinent to the operation of an automobile is there a proper basis for classification than all other noise regulations enumerated in plaintiff's memorandum, Point IV, May 25, 1984.

s/ Charles A. Weil

Sworn to before me this
19th day of April, 1985

s/George P. Flynn
GEORGE P. FLYNN
Notary Public, State of New York
No. 30-1258330
Qualified in Nassau County
Certificate Filed in New York County
Commission Expires March 30, 1987

APPENDIX K—APPELLANT'S LETTER TO APPELLEES DEMANDING DISCLOSURE DATED MAY 23, 1984

CERTIFIED p 350 970 593

CHARLES A. WEIL
485 Park Avenue
New York, N.Y. 10022

Tel. 752-1982

May 23, 1984

Environmental Control Board
333 West 34 Street
New York, N.Y.10001

Re 016-813-042

Gentlemen:

I have just received notice of hearing for June 4 and request adjournment on grounds I cannot prepare for same

I phoned your rescheduling office and pursuant its instructions herewith confirm same in writing.

I shall need at least 15 days adjournment.

Meantime I request disclosure; a bill of particulars duly verified and/or written interrogatory, likewise under oath of the facts and circumstances under which I am alleged to have violated any law that is constitutional.

Among other things:

Appendix K

1. Exactly where the complainant officer was and what duty he was performing after 5.00 PM Daylight saving at all times after that time with copy of his duty assignment, duly verified by his precinct commander.

2. How many violations of the regulation herein involved have been processed in the years 1979, 1980, 1981, 1982 and 1983.

Respectfully submitted

s/ Charles A. Weil
Charles A. Weil

APPENDIX L—COMPLAINT FILED MAY 25, 1984 WITH EXHIBITS

84 CIV. 3730

UNITED STATES DISTRICT COURT
THE SOUTHERN DISTRICT OF NEW YORK

CHARLES A. WEIL

Plaintiff pro se

against

JOSEPH T. McCLOUGH and ERMYN STROUD

Defendants

1. I am plaintiff, a licensed automobile operator, domiciled at 485 Park Avenue, County and State of New York, 10022, telephone (212) 752-1982.

2. Defendants are:
   Hon. Joseph T. McClough, Commissioner of the Environmental Control Board of the City of New York, and Hon. Ermyn Stroud, Administrative Law Judge of the above named city commission, not officials of any state. 333 West 34 Street, New York, N.Y. 10001.

3. Plaintiff received a simplified information, alleged to be a "Notice of Violation," per copy annexed, Ex.A for alleged "horn-honking" and pleaded not guilty, said notice being numbered E-016-813-042.

4. Shortly thereafter, plaintiff requested in writing a verified

bill of particulars and/or supporting affidavit, pursuant New York State CPLR 100.25, governing any such information which was denied by defendants on grounds their rules did not provide for same.

5. Defendants' regulation under which said alleged simplified information was served reads as follows, unconstitutionally.

> Section 1403,3-4.05 Sound Signal Devices
> No person shall operate or use or cause to be operated or used any sound signal device so as to create an unnecessary noise; except that no person shall operate or use or cause to be used any klaxon on a motor vehicle, except as a sound signal of imminent danger—

6. While driving his car, alone and prior to service of said simplified information, plaintiff signalled with his arm to a police officer in plain sight, fifteen feet away, to call said offi er's attention to violations of traffic law (NYC TR 81c (2) and 83, and then blocking the right hand turn into Lexington Avenue for several minutes, causing nuisance to hundreds, if not thousands, of other persons stalled thereby for nearly a half hour.

7. Said officer ignored said arm signal, whereupon, for lack of alternative channel of communication; without plaintiff's violating regulations, by leaving his car; plaintiff made a split-second, almost inaudible, beep of his horn, to call said officer's attention, in a non-residential, unprotected, unrestricted area, to said indisputable traffic violations and nuisance.

Appendix L

8. Plaintiff verily believes and alleges said defendants' regulation per par 5 above, is repugnant to the Constitution of the United States being:

   a. vague and indefinite, i.e. the words imminent danger in a regulation penal or criminal in nature.

   b. denying equal protection of the laws to motorists, denying only to them; to fund the defendants board and facilitate the serving of "tickets" for goals or quotas of patrolmen; any objective (as distinguished from subjective narrowly drawn standards, limits, or specificity required in all other *bona fide* noise regulations of defendant's administrative agency.

   c. overbroad

9. Plaintiff is informed and verily believes identical simplified informations, relative such regulation per form, Ex A, are carried by many, if not all, patrolmen in the City of New York and are frequently used and served on alleged violators of said regulation, and will continue to be so served, unless this Court addresses the constitutional questions herein above.

10. Plaintiff verily believes no court has ever passed on said novel constitutional questions and challenges defendants to cite any authority in which in an opinion of any court, any of above constitutional questions have been passed

upon by any court of the United States or the State of New York.

11. Plaintiff is suing *pro bono publico* on grounds said regulation also is a preposterous infringement on the rights of the people under the ninth and tenth amendments, affecting perhaps millions of licensed drivers.

12. Plaintiff herein has demanded of defendants, but not received disclosure of the facts and circumstances alleged under which he is alleged to have violated any constitutional law and information whether the constitutionality of the said regulation has ever been addressed or passed upon in any court but been refused same.

13. Notice of hearing, per EX A, has been received by plaintiff and plaintiff has requested adjournment but denied on grounds same has not been requested by mail. Such adjournment for fifteen days has been requested by certified mail.

WHEREFORE plaintiff demands:

1. Declaratory judgment said regulation is unconstitutional

2. Injunction enjoining defendants from further proceeding in their matter E-016-813-042.

3. Temporary stay of proceedings therein until the constitutional questions herein have been settled and decided

4. Preference because of plaintiff's age 86, and health permitting him be heard in this action prior to June 26, or

immediately after his return to New York, after September 1, for reasons of health.

Respectfully submitted,

s/Charles A. Weil
Charles A. Weil, pro se
485 Park Avenue
New York, N.Y. 10022
Tel: (212) 752-1982

Appendix L

EXHIBITS

ENVIRONMENTAL CONTROL BOARD

TO ADMIT THE VIOLATION:

1. See the face of this notice to find the amount of the [illegible] penalty. If a specific penalty is not entered you may NOT plead by mail. YOU MUST APPEAR IN PERSON OR BY COUNSEL for a hearing on the date and time set for appearance on the reverse side. The hearing is your opportunity to answer the allegations herein. If MULTIPLE OFFENSE SCHEDULE is checked, you must pay the minimum penalty listed in the schedule printed below, based on the number of violations in the past five (5) years.
2. Complete the Plea Form below and check the ADMIT box.
3. Mail your check or money order in the correct amount, payable to the Treasurer, Control Board, City of New York within 10 days, together with this notice to the Environmental Control Board, mailing address below. Write the notice number on the check or money order. DO NOT SEND CASH.

MAILING ADDRESS
ENVIRONMENTAL CONTROL BOARD
Post Office Box 307
Peck Slip Station
New York, New York 10038

OR

Bring this notice to the Environmental Control Board office, address below, between 8:00 A.M. and 4:00 P.M. on the date of appearance. Come prepared to pay civil penalty.

TO ADMIT THE VIOLATION WITH AN EXPLANATION:

1. You MUST appear in person or by counsel for this type of plea.
2. Complete the Plea Form below and check the Admit With An Explanation Box.
3. Bring this notice and all proof (evidence, witnesses, etc.) with you to your hearing at the Environmental Control Board on the date and time set for the appearance. Come prepared to pay civil penalty.

TO DENY THE VIOLATION:

1. You MUST appear in person or by Counsel at the Environmental Control Board on the date and time set for the appearance. A SECOND APPEARANCE MAY THEN BE REQUIRED AT A LATER DATE FOR FORMAL PLEADING. Bring this notice and all proof (evidence, witnesses, etc.) with you at each appearance. In the event you are found in violation, be prepared to pay Civil penalty.
2. Complete the Plea Form below and bring it with you when you appear.

MULTIPLE OFFENSE SCHEDULE	Min.	Max.
1st Violation	$ 25	$ 50
2nd Violation	$ 50	$ 100
3rd Violation	$100	$ 250
4th Violation	$250	$1000

ENVIRONMENTAL CONTROL BOARD
PART 3
333 West 34th St.
7th Floor
N.Y., N.Y. 10001

NOTE: If no maximum penalty is shown in the Maximum Penalty Box on the reverse side of this civil summons YOU HAVE THE RIGHT TO BE INFORMED OF THE MAXIMUM PENALTY BEFORE PLEADING. Inquire at the above address. Failure to appear or to pay the civil penalty may lead to a Default Judgment.

An additional $50.00 penalty will be imposed if you do not appear or mail in the penalty (if permitted).

The Environmental Control Board has the option to impose higher penalties for each repeated violation to the maximum penalty provided by law or regulation. Suspension or revocation of your license may also result.

Do not detach

PLEA FORM

I hereby plead to the violation that I

☐ ADMIT ☐ ADMIT WITH AN EXPLANATION* ☒ DENY*

NAME: Charles A. Weil

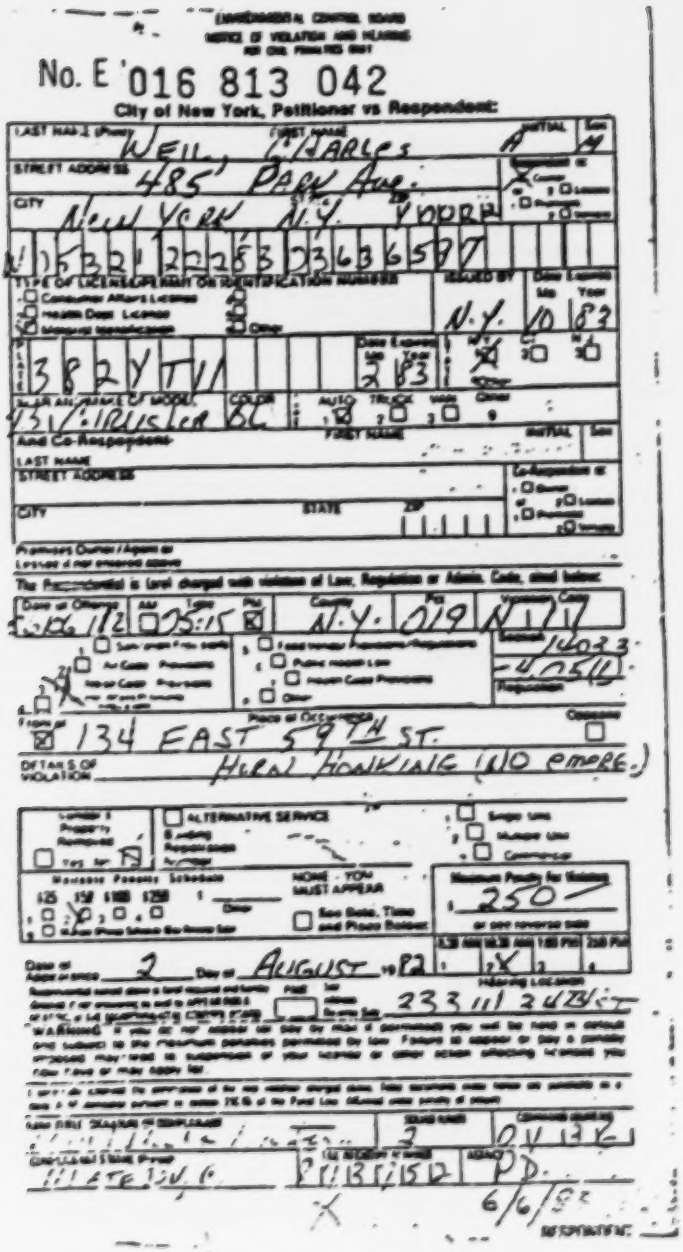
ADDRESS: 485 Park Avenue

CITY: New York, N.Y. 10022 STATE: [illegible] ZIP: (212) 759-2

SIGNATURE: [signature] DATE:

*Requests Must Be Received At Above Address On Return Date

Appendix L



ENVIRONMENTAL CONTROL BOARD
NOTICE OF VIOLATION AND HEARING
AND ORDER TO PAY PENALTIES ONLY

No. E 016 813 042

City of New York, Petitioner vs Respondent:

LAST NAME: WEIL
FIRST NAME: CHARLES
MIDDLE INITIAL: A
STREET ADDRESS: 485 PARK Ave.
CITY: New York
STATE: N.Y.
ZIP: 10022
TYPE OF LICENSE/PERMIT OR IDENTIFICATION NUMBER:
ISSUED BY: N.Y.
Date Expires: 10 83
Date Issued: 2 83
PLATE NO.: 38 2 YTV
YEAR: 83
MAKE OR NAME OF VESSEL: 931 Porsche
COLOR: BL
AUTO / TRUCK / VAN / OTHER
And Co-Respondent:
LAST NAME
FIRST NAME
MIDDLE INITIAL
STREET ADDRESS
CITY
STATE
ZIP
Co-Respondent is: Owner / Lessee / Operator
If Operator / Agent or Lessee of car owned above:
The Respondent is (are) charged with violation of Law, Regulation or Admin. Code, cited below:
Date of Offense: 6/6
Time: 12:15
Place: NY
Code: 019
Violation Code: N 1 17
Section: 1602 3
Regulation: -0511
Place of Occurrence: 134 EAST 59TH ST.
Occupancy:
DETAILS OF VIOLATION: Illegal Parking (No Empire.)
ALTERNATIVE SERVICE
Maximum Penalty for Violation: $ 250
HEARING - YOU MUST APPEAR
Date of Hearing: 2 Day of AUGUST 82
Hearing Location: 233 11 24th St
WARNING
Date: 6/6/82
Issuing Agency: PD
Officer's Name: [illegible]
Officer's Shield No.: 13152
Officer's Signature: [illegible]
INTERPRETER:

APPENDIX M—RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

A. Constitutional:

> No person shall be deprived of life, liberty or property without due process of law nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person . . . the equal protection of the laws . . . shall make no law . . . abridging the freedom of speech . . . or the right . . . for a redress of grievances.
>
> No state shall make or enforce any law which shall abridge the privileges or immunities, nor shall deprive any person—of property without due process of law.
>
> In all criminal prosecution shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . The enumeration of right . . . shall not be construed to deny others retained by the people . . . The powers not delegated . . . are reserved . . . to the people.

B. Statutory

New York City Traffic Regulations (NYCTR):

> 71. No driver shall enter an intersection unless there is sufficient unobstructed space beyond the intersection to accommodate the vehicle he is operating. . . (spillback or gridlock).

Appendix M

83. No person shall stand or park upon any street . . . as to obstruct the movement of traffic and in no instance so as to leave less than ten feet available for the free movement of vehicular traffic.

New York State Vehicle and Traffic Law (VTL):

1. Every motor vehicle . . . shall be provided with . . . suitable and adequate horn . . . for signalling . . .

386. No motor vehicle which makes excessive or unusual noise shall operate
2. which produces a sound level of eighty decibels

3. . . . the ear phone shall be placed at a distance of fifty feet.

§ 1175. Obstructing traffic at intersection.

When vehicular traffic is stopped on the opposite side of an intersection, no person shall drive a vehicle into such intersection except when making a turn unless there is adequate space on the opposite side of the intersection to accommodate the vehicle he is driving notwithstanding the indication of a traffic control signal which would permit him to proceed.

New York State Vehicle & Traffic Commissioners Regulations:

Appendix M

Sec. 131.1 Paragraph (d) of subdivision 3 of Section 510 of the Vehicle & Traffic Law provides that a license may be revoked for habitual violations of any of the provisions of—the law.

131.3 All traffic violations shall be assigned a point value of two points, except as otherwise prescribed.

New York State Criminal Procedure Law:

100.10 (1) An information is a verified written accusation—filed with a local criminal court—for the commencement of a criminal action and for the prosecution thereof in a local criminal court

(2) A simplified information is a written accusation by a police officer—filed with a local criminal court which charges a person—being in a brief or simplified form. It serves as a basis for commencement of a criminal action—as basis for prosecution of such charges.

New York State Civil Practice Laws and Regulation (CPLR):

104. The civil practice law and rules shall be liberally construed to secure . . . the inexpensive determination of every civil judicial proceeding.

304. An action is commenced—by service of a summons.

301 2b. If the complaint is not served with the summons—service of the complaint shall be made

within twenty days—The court upon motior may dismiss the action.

3041. Any party may require any other party to give a bill of particulars. . . .

Administrative Code of the City of New York:

1403.3-8.10(c) Any person convicted of a wilfull failure to pay a civil penalty imposed by the board—shall be punished by a fine—or imprisonment of not more than sixty days or both.

(e) Any person convicted of violating any provision of this code—-shall be punished by a fine—or by imprisonment for twenty days—

Supreme Court, U.S.
FILED
SEP 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-46

In The

Supreme Court of the United States

October Term, 1986

CHARLES A. WEIL,

Petitioner,

vs.

JOSEPH T. McCLOUGH and ERMYN STROUD,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

CHARLES A. WEIL
Petitioner, Pro Se
485 Park Avenue
New York, New York 10022
(212) 752-1982

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APPENDIX

Appendix A—Affidavit With Attachments 1a

No. 86-46

In The

Supreme Court of the United States

October Term, 1986

CHARLES A. WEIL,

Petitioner,

vs.

JOSEPH T. McCLOUGH and ERMYN STROUD,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

STATEMENT

The petitioner, Charles A. Weil, *pro se*, respectfully submits this supplemental brief pursuant to Rule 22.6 to call attention to matter not available at the time the petition for writ of certiorari was filed.

REASONS FOR GRANTING THE WRIT

Respondents' failure to answer the petition that could not adequately cover glaring errors of practice and abuse of discretion in District Court within the thirty pages per Rule 22.1 alluded to therein at pp. 5-6, 14, 27-28.

RESPONDENTS' MOTION FOR SUMMARY JUDGMENT WAS IMPROPERLY BROUGHT, INAPPROPRIATE AND IMPROPERLY GRANTED.

Facts

Petitioner's complaint alleges he beeped his horn to call policeman's attention to

"violations of law"

not

"massive traffic jam" (19a) *hors record*; "massive traffic jam" (18a) *hors record*

per District Court opinion, demurred to eleven times to Circuit Court plus

"gridlock"

violative of State Vehicle & Traffic Law and New York City Traffic regulations, nineteen times (main brief); twice in reply brief, once again in petition for rehearing *en banc* to no avail.

Respondents never denied such "misapprehensions", and Circuit Court "misapprehended" it as

"traffic conditions" (4a)

likewise *hors record*.

Petitioner also alleged he

> signaled with his arm to a police officer (par. 6), said officer ignored said arm signal, whereupon—made a—beep on his horn (par. 7).

But District Court found

> a police officer acknowledged his hand signal

(20a) also *hors record*, to obviate addressing the privileges and immunities clause (Petition p. 5).

RESPONDENTS' MOTION TO DISMISS WAS IMPROPERLY BROUGHT.

Said motion was brought on March 12, 1985 after District Court's order of January 17, 1985 which called only for *memoranda* addressing constitutional questions (19a). Respondents, however, waived Brief in Opposition dated July 17, 1986 on which petitioner had relied for a Reply Brief to bring out adequately vital errors of practice below, because of space limitations of Rule 21.4, so as to cover the facial unconstitutionality of the regulation, *pro bono publico** (45a).

SUMMARY JUDGMENT WAS INAPPROPRIATE.

Said motion herein is one of instances where such judgments

---

* There was only space to merely mention such blatant errors at pp. 5-6, 14, 27-28 of petition.

are undesirable. (Moore's Manual of Federal Practice and Procedure (2d Ed.), Rule 56.772; *Board of Education v. Pico,* 102SCT2799, 457 U.S. 853)

> "Any doubt as to the existence of a genuine issue of material fact must be resolved against the moving party" (*Adickes v. S. H. Kress,* 398 U.S. 144, 157-9). "Furthermore, on summary judgment the inference to be drawn from the underlying facts contained in the affidavits . . . must be viewed in the light most favorable to the party opposing the motion" (*United States v. Diebold, Inc.,* 369 U.S. 654, 655).

Accord: Arnstein v. Porter, 154 F. 2d 389; *Hurtado v. United States,* 410 U.S. 478.

In a matter, significantly, *pro se*

> "The nature of their allegations make it even more important than usual that plaintiff not be deprived because of their ignorance of the role of affidavits under Rule 56(c) of a full and fair opportunity to pursue their claims." *Madyum v. Thompson,* 657 F. 2d 868, 877; *Haines v. Kerner,* 404 U.S. 519; *Carter v. Stanton,* 405 U.S. 669; *Yusof Asad v. Thompson,* 657 F. 2d 868; *Rodriguez v. Board of Education,* 620 F. 2d 320

District Court overlooked summary judgment is particularly inappropriate when

> ". . . underlying issue is one of constitutionality, motivation, intent or some other subjective fact . . ." *Shepard* p. 352; *Conrad v. Delta Airlines,* 494 F. 2d 914

and when it casts aspersion on petitioner's motive to inform of violation of law (19a)

> ". . . that he was not simply expressing his fustration . . " (*hors record*)

THE MOTION WAS IMPROPERLY GRANTED.

The Court never alerted petitioner of his right to amend his complaint, set date for hearing of the motion and denied petitioner's motion for supplementary pleading, April 19, 1985. Then the motion was granted on gross distortion of the petitioner's clear pleading relative violations of law, to which petitioner called the officer's attention, *supra. Rodriguez v. Board of Education,* 620 F. 2d 320

All well-pleaded allegations must be taken as true. *Dayco v. Goodyear Tire & Rubber,* 523 F. 2d 389; *Arnstein v. Porter,* 154 F. 2d 464.

Under Rule 56, summary judgment cannot be granted unless there is no genuine issue as to any material fact. *Carter v. Stanton, supra; Shepard, supra,* at p. 350, 351, 359.

District Court is not authorized to resolve issues of fact on a motion for summary judgment. *Choudry v. Jenkins,* 559 F. 2d 1085, 1086, 1089, *cert. denied,* 434 U.S. 997.

Also, where District Court overlooked, care must be taken to give the parties an opportunity to present materials in opposition. *Filli Marettis v. Continental Grain Co.,* 563 F. 2d 563; *Dale v. Hahn,* 440 F. 2d 33 at 8; Moore, 56.32, *supra*; *Blanks v. Register,* 493 F. 2d 697; *Deborah Gordon v. National Youths World Alliance,* 675 F. 2d 367; 2A Moore, 12.09, 2300; *Cortello v. Pauline Sports, Inc.,* 381 F. 2d 81, 85.

Petitioner had two rights to amend his pleading:

1. because of intervening events, not available when the complaint was served, a year previous, and

2. because of motion for summary judgment to dismiss, the latter is absolute, a matter of right (*Rogers v. Girard Trust*, 159 F. 2d 239); and denial of opportunity to present all material facts (*Blanks v. Register*, 493 F. 2d 697); by alerting petitioner of said right to amend and set date for argument on the motion, a *fortiori* since petitioner was *pro se* (*Yusuf V. Assad v. Thompson, supra, Board of Education v. Pico, supra; Labatt v. Twomy*, 513 F. 2 641; Rule 56(c).

Such right to amend was also held necessary (*Zenith Radio Co. v. Hazelton*, 401 U.S. 321; *Shuman v. Hallbauer*, 455 F. 2d 1236, 1242; Rule 15(a) and (d)); and it was held an abuse of discretion to grant a motion without same (*Enochs v. Sisson*, 301 F. 2d 125; *Davis v. Howard*, 561 F. 2d 565).

It could have granted either right to amend, but not deny both. The second because of mislabelling. Mislabelling has been held immaterial. (Moore, 56.02 *supra; Lyman v. Livingston*, 257 F. 2d 520; *Nycoseal, Inc. v. Parke Davis*, 28 F.R.D. 24; *Schuckman v. Rubenstein*, 164 F. 2d 952, *cert. denied*, 333 U.S. 875; Federal Practice and Procedure, 1360, 1373, Wright, Miller Cooper.

It is submitted the waiver of Brief in Opposition dated July 17, 1986 was an "intervening matter not available at the time of the party's last filing." (Rule 22.6)

CONCLUSION

Petitioner submits that the writ should be granted due to the failure of respondents to answer the petition that could not cover glaring errors of practice and abuse of discretion below within the thirty pages per Rule 22.1

If a court may torture the plain words of a plaintiff's complaint to preempt addressing violation of a constitutionally protected right; privilege and immunity clause; it is contrary to rule that plaintiff's pleading on motion for summary judgment to dismiss must be assumed to be true. If a municipal body may legislate an ouster of this Court's jurisdiction by mislabelling a penalty as civil when clearly penal, it spells the end of all constitutionally protected rights to the man in the street.

Respectfully submitted,

CHARLES A. WEIL
Petitioner, pro se

APPENDIX A—AFFIDAVIT WITH ATTACHMENTS

No. 86-46

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1986

CHARLES A. WEIL,

Petitioner,

vs.

JOSEPH T. McCLOUGH and ERMYN STROUD,.

Respondents.

AFFIDAVIT

CHARLES A. WEIL being duly sworn deposes and says:

I am plaintiff-petitioner, *pro se*, in above entitled matter and fully conversant with its facts and proceedings.

1. Respondent's motion for summary judgment dismissing the petition herein was brought improperly March 12, 1985, after District Court's order, January 17, 1985 (Ex. A) which called for submission of memoranda *only*, addressing only constitutional questions.

2. Petitioner had pleaded he beeped his horn *only* to call attention to "violations of law", (sic) not "massive traffic jam" (19a) as found by District Court and specifically "gridlock", violation

Appendix A

of New York State Vehicle and Traffic Law and New York City Traffic Regulation, and other Traffic Regulations.

3. District Court never alerted petitioner of his rights to amend the complaint or set date for hearing on motion to dismiss; but,

4. Denied petitioner's motion for supplementary pleading of occurrences and events a year after the complaint.

5. District Court's opinion made findings grossly distorting plaintiff-petitioner's pleading (*supra,* Par. 2) relative violations of law, while Circuit Court misapprehended it as "about traffic conditions" (4a).

6. Respondents, on July 17, 1986, waived brief in opposition, on which petitioner had planned, to fully cover, by reply, errors of practice herein below, by restriction to 30 pages of Rule 21.4, in order more fully to cover the facial aspects of unconstitutionality of the regulation herein, *pro bono publico.*

s/ Charles A. Weil

Sworn to before me this
29th day of August 1986

s/ Darlene Williams
DARLENE WILLIAMS
Notary Public, State of New York
No. 41-4809364
Qualified in Queens County
Certificate filed in New York County
Commission Expires March 30, 1988

Appendix A

EXHIBIT A

ENDORSEMENT

CHARLES A. WEIL v. JOSEPH T. McCLOUGH et al., 84 Civ. 3730 (GLG)

Motion granted to the extent that the defendants will serve opposing papers by February 28, 1985, with the plaintiff serving his responding papers by March 25, 1985. The Court will then address the constitutional issues.

SO ORDERED.

Dated: New York, N.Y.
January 17, 1985

s/ Gerard L. Goettel
GERARD L. GOETTEL
U.S.D.J.

Appendix A

EXHIBIT B

THE CITY OF NEW YORK

LAW DEPARTMENT
100 Church Street
New York, N.Y. 10007

FREDERICK A.O. SCHWARZ, JR.
Corporation Counsel

July 17, 1986

Hon. Alexander L. Stevas
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: *Charles A. Weil v. McClough et ano.*
(Docket No. 86-46)

Dear Sir:

The Corporation Counsel of the City of New York represents Joseph T. McClough and Ermyn Stroud, respondents herein. In view of the fact that this case clearly does not warrant review by this Court, respondents waive their right to file a brief in opposition to petitioner's application for a writ of certiorari.

Respectfully submitted,

FREDERICK A.O. SCHWARZ, JR.,
Corporation Counsel of the City of New York

Appendix A

By: s/ Ellen B. Fishman

ELLEN B. FISHMAN
Assistant Corporation Counsel
Appeals Division

cc: Mr. Charles A. Weil
Petitioner Pro se
485 Park Avenue
New York, New York 10022

Appendix A

EXHIBIT C

COUNTY OF NEW YORK PERSONAL SERVICE

I, Angel Diaz, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 1670 Southern Blvd., Bronx, NY 10060.

On 8-5-86 deponent served the within Petition for Certiorari pages 13 & 14 upon:

Frederick A. O. Schwarz Jr.
100 Church Street, New York, NY 10007

the Attorney(s) in this action by delivering 3 true copy(ies) thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein.

Sworn to before me
8-5-86

s/ Angel Diaz
Angel Diaz

(Weil AAS-7 Weil v. McClugh)

s/ Robert T. Brin
ROBERT T. BRIN
Notary Public, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1987

Appendix A

EXHIBIT C1—PAGE 14

"penal in nature" and governed in New York State by the "criminal law".

The opinions completely misapprehend what is completely *hors record* (and completely refuted by supplemental pleadings #9, 10, 19, and he had to be completely blind not to have been aware of, the "condition" but that its *causes* were the violations. Petitioner deemed it his right and duty to exercise his constitutional rights per privilege and immunity clause to inform him of *violations of law* while there were undisputed violations of the Fourteenth Amendment's clauses: equal protection, due process, and privileges and immunities, denied facts and circumstances.

On the desperately repugnant proposition, never raised by respondents, inconsistent with the memorandum decision dated November 16, 1984 (App. 13a) citing no authority, significantly never raised prior to their March 11, 1985 memorandum, and then only to evade the strict scrutiny test per petitioner's Point II

the relatively light civil penalty

courts below were misled relative the "civil" penalties by respondents' glaring misstatements in their March 11, 1986 memorandum

> the regulation imposes only civil penalties
> enactment with civil rather than criminal penalties.

There is no such imposition or enactment in Sec. 1403.3-4.05(1). It is only on the *sui generis* instrument and overlooking the charge herein is penal in nature and the Supreme Court's crucially contrary

per curiam ruling (*Drew v. Maryland,* 381 U.S. 421 at 423 fn., relative a $25 fine).

> This Court has said (and I hope never does) let the fact that the criminal penalty is relatively small, stand in the way of reviewing a case presenting